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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1931

## No. 664

PIEDMONT AND NORTHERN RAILWAY COMPANY, PETITIONER,

*vs.*

INTERSTATE COMMERCE COMMISSION, SOUTHERN RAILWAY COMPANY, CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 29, 1932.

CERTIORARI GRANTED MARCH 14, 1932

(36,478)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 29, 1932

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# TRANSCRIPT OF RECORD

## INTRODUCTION.

THE UNITED STATES OF AMERICA,
WESTERN DISTRICT OF SOUTH CAROLINA, to-wit:

At a District Court of the United States for the Western District of South Carolina, begun and held at the Masonic Temple in the City of Spartanburg, on the 20th day of October in the year of our Lord one thousand, nine hundred and thirty.

Present: The Honorable J. Lyles Glenn, District Judge for the Western District of South Carolina.

Among other were the following proceedings, to-wit:

| | |
|---|---|
| Interstate Commerce Commission, Southern Railway Company, Charleston and Western Carolina Railway Company, Atlantic Coast Line Railroad Company, Louisville and Nashville Railroad Company, Carolina, Clinchfield and Ohio Railway, Carolina, Clinchfield and Ohio Railway of South Carolina, and Clinchfield Northern of Kentucky, Plaintiffs, *vs.* Piedmont and Northern Railway Company, Defendant. | In Equity No. 253 |

## BILL OF COMPLAINT.

(2) (Filed April 16, 1930.)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA, AT GREENVILLE.

| | |
|---|---|
| Interstate Commerce Commission, Plaintiff, *vs.* Piedmont & Northern Railway Company, Defendant. | In Equity No. 253. |

To the Honorable Judges of the District Court of the United States for the Western District of South Carolina:

The Interstate Commerce Commission (hereinafter called the "Commission"), a Commission existing under and by virtue of the Interstate Commerce Act and the acts amendatory thereof and supplementary thereto, files this its bill of complaint against defendant, Piedmont & Northern Railway Company, and thereupon complains and says:

1. This suit is brought, and the jurisdiction of this court is invoked, under the provisions of section 1, paragraph (20), of the *Interestate* Commerce Act (24 Stat. 379, as amended 41 Stat. 478; U. S. C. Title 49, Sec. 1, Par. (20)), and under the provisions of the Judicial Code, Section 24, (U. S. C. Title 28, Sec. 41, Par. (8)).

2. Defendant is, and at all times herein mentioned was, a corporation chartered, organized, and existing under and by virtue of the laws of the State of South Carolina, as a common carrier by railroad; and defendant is, and at all times herein mentioned was, a resident and inhabitant of the State of South Carolina, with its principal office in the city of Greenwood in the Western District of South Carolina.

(3) 3. At all times herein mentioned defendant was, and now is, a common carrier by railroad subject to the Interstate Commerce Act, and as such was, and now is, engaged in the interstate transportation of property and passengers for hire over two certain lines of railroad owned, controlled, and operated by it, to-wit; a line of railroad in South Carolina, extending from Greenwood to Spartanburg, a distance of 89.9 miles, with a branch line from Belton to Anderson, in that state, of 11.3 miles; and a line of railroad in the State of North Carolina, extending from Gastonia to Charlotte, a distance of 23.5 miles, with a branch line from Belmont Junction to Belmont, in said state, of 3.2 miles.

4. At all of said times defendant was, and now

is, a carrier by railroad within the meaning of that term as used in Section 1, paragraphs (18) and (20) of the Interstate Commerce Act (41 Stat. 477, 478; U. S. C., Title 49, Sec. 1, paragraphs (18) and (20)).

5. On March 26, 1927, defendant applied to the Commission under the provisions of Section 1, paragraphs (18), (19), and (20) of said Interstate Commerce Act, for a certificate that the public convenience and necessity required, and would require, the construction and operation by it of two extensions of its said lines of railroad, the first connecting Spartanburg, the northern terminus of its South Carolina line, with Gastonia, the southern terminus of its North Carolina line, and the other extending from Charlotte, the northern terminus of its North Carolina line, to Winston-Salem, N. C. Interventions were filed by certain common carriers by railroad and other interested parties, both in support of said application and in opposition thereto. Following full hearing, the Commission on April 3, 1928, made and entered its report and order, finding "that the present and future public convenience and nec-
(4) essity is not shown to require the construction by the applicant of the lines of railroad described in the application" and denying said application. Said Commission's report and order appears in *Proposed Construction of Lines by Piedmont & Northern Railway Company*, 138 I. C. C. 363, and a true copy of said report and order, certified by the Secretary of the Commission, is hereto attached and made a part hereof, marked Exhibit A. The Commission has not in any way modified or altered its finding and action so taken in said proceeding, and has not issued its certificate for the construction of said lines of railroad proposed by defendant, or for any portion thereof, or for the construction by defendant of any line of railroad whatsoever.

6. Plaintiff is informed and believes, and so alleges, that on, to wit, March 10, 1930, defendant, without having first obtained from the Commission the certificate required in such case by said Section 1, paragraphs (18), (19), and (20) of the Interstate Commerce Act (41 Stat. 477, 478; U. S. C., Title 49, Sec. 1, paragraphs (18), (19), and (20)), undertook the extension of its said line

or lines of railroad, and on, to wit, March 11, 1930, actually began construction thereof at Spartanburg, S. C., and Gastonia, N. C., all with the intention to complete the construction of an additional or extended line or lines of railroad connecting the said northern terminus of its South Carolina line with the said southern terminus of its North Carolina line, and to engage in transportation under the Interstate Commerce Act over or by means of such additional or extended line or lines of railroad; that defendant has ever since that time been engaged in said undertaking and is now engaged therein.

7. That said acts of defendant, described in the preceding paragraph, were and are contrary to the provisions of said section 1, paragraphs (18), (19), and (20) (5) of the Interstate Commerce Act, and are subject to be enjoined by this court at the suit of this plaintiff under the express provisions of said paragraph (20); that, unless restrained by this court, defendant intends to, and will, continue the construction of said extension or extensions of its line or lines of railroad and, when constructed, will operate, and continue to operate, said extension or extensions of its line or lines of railroad in interstate commerce in violation of said provisions of the Interstate Commerce Act.

## PRAYER.

Wherefore, since plaintiff is without remedy at law in the premises and is expressly given its remedy in equity under the provisions of said section 1, paragraph (20) of the Interstate Commerce Act, plaintiff prays:

a. That a writ of subpoena issue against the defendant requiring it, on or before a date to be specified therein, to appear before this honorable court, and then and there to make answer to this bill of complaint.

b. That the defendant be permanently enjoined from constructing and from continuing to construct, said extension or extensions of its line or lines of railroad above mentioned in paragraph 6 hereof, or any extension or extensions of its line or lines of railroad, unless and un-

til there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such construction.

c. That a temporary or interlocutory injunction be issued herein restraining and enjoining defendant from doing any of the acts mentioned in paragraphs 6 and 7 hereof until the further order of the court.

d. That such other and further relief in the premises be granted as to the court may seem meet and as
(6) justice and equity may require.

e. That plaintiff have and recover of defendant its costs of this suit.

This is the first application for an injunction in this case.

INTERSTATE COMMERCE COMMISSION,
By (signed) DANIEL W. KNOWLTON,
Its Solicitor.
(signed) JOSEPH A. TOLBERT,
U. S. Atty.

CITY OF WASHINGTON,
District of Columbia, ss:

BALTHAZAR H. MEYER, being duly sworn, deposes and says that he is a member of the Interstate Commmerce Commission, the plaintiff in the above-entitled cause, and makes this affidavit on behalf of said Commission; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true.

(signed) BALTHASAR H. MEYER.

Subscribed and sworn to before the undersigned, a notary public in and for the District of Columbia, this 8th day of April, 1930.

Seal (signed) EUGENIA W. SUTER,
Notary Public.

(7) Exhibit "A" attached to and forming a part of bill of complaint. Same Exhibit attached to Original Amended Bill of Complaint but not put in the Transcript as same would be repetition—

**EXHIBIT "A".**

(7a) INTERSTATE COMMERCE COMMISSION

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FINANCE DOCKET NO. 6208

PROPOSED CONSTRUCTION OF LINES BY PIEDMONT & NORTHERN RAILWAY COMPANY

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*Submitted December 10, 1927. Decided April 3, 1928*

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Public convenience and necessity not shown to require the construction by the Piedmont & Northern Railway Company of extensions of its lines of railroad from Spartanburg, S. C., to Gastonia, N. C., and from Charlotte to Winston-Salem, N. C. Application denied.

*Charles E. Hughes, Mark W. Potter, W. S. O'B. Robinson, jr.*, and *Cameron Morrison* for applicant.

*William G. McAdoo* for Georgia & Florida Railroad; *Angus W. McLean* and *Dennis G. Brummitt*, for State of North Carolina; *John G. Richards, Cordie Page*, and *R. H. McAdams* for State and Railroad Commission of South Carolina; *L. E. Jeffries, Sidney S. Alderman, F. P. Hobgood, John N. Wilson, Stahle Linn, P. A. Bonham, C. J. Rixey*, and *L. L. Oliver* for Southern Railway Company; *James F. Wright, L. R. Varser*, and *C. R. Capps* for Seaboard Air Line Railway Company; *F. Barron Grier* and *Carl H. Davis* for Charleston & Western Carolina Railway Company; *George B. Elliott* and *Carl H. Davis* for Atlantic Coast Line Railroad Com-

pany; *William C. Burger* for Louisville & Nashville Railroad Company; *James J. McLaughlin* for Carolina, Clinchfield & Ohio Railway, Carolina, Clinchfield & Ohio Railway of South Carolina, and Clinchfield Northern Railway of Kentucky; *C. F. Haynsworth* for city of Greenville, county of Greenville, and Greenville Chamber of Commerce; *James F. Byrnes, C. E. Daniels, C. C. Wyche, W. H. Hendley, Ben Hill Brown,* and *H. A. Ligon* for chamber of commerce of Spartanburg, county of Spartanburg, and Spartanburg Transportation Association; *Frank Armfield, J. L. Crowell, jr.,* and *B. W. Blackwelder* for city of Concord and Cabarrus County; *William T. Ritter* for county of Forsyth, city and chamber of commerce of Winston-Salem; *George W. Forrester* for cotton manufacturers associations of North and South Carolina; *W. L. Thornton, jr.,* for North Carolina Shippers Association; *J. D. Lanford* for city and chamber of commerce of Greer; *A. E. Woltz* for town of McAdensville, Gaston County, city of Gastonia, town of Lowell, town of Belmont, and the Gastonia Chamber of Commerce; *Thomas Allen* for city, county, and (7b) chamber of commerce of Anderson, and towns of Honea Path, Belton, and Williamston; *F. M. Gresham* for Mecklenburg County; *I. M. Bailey* and *A. J. Maxwell* for North Carolina Corporation Commission; *W. T. Creighton* for Charlotte Shippers' & Manufacturers' Association, and chamber of Commerce of Charlotte; *Kerr Craige* for county of Rowan, city and chamber of commerce of Salisbury, and Salisbury-Spencer Merchants' Association; *W. D. Burgin* for county of Davidson, city of Lexington, Lexington Retail Merchants' Association, and Lexington Chamber of Commerce; *George* T. Barnes for city and county of Greenwood and chamber of commerce of Greenwood; *V. Paul Rosseau* for Charlotte Merchants' Association; *W. H. McGinnis* for town and chamber of commerce of Kings Mountain; *Butler & Hall* for Cherokee County and city and chamber of commerce of Gaffney; *R. A. Dobson* for town and chamber of commerce of Blacksburg; interveners.

*John E. Benton* for National Association of Railroad and Utilities Commissioners.

REPORT OF THE COMMISSION

BY THE COMMISSION:

Exceptions were filed to the report proposed by the examiner and the case was argued orally.

The Piedmont & Northern Railway Company, a carrier by railroad subject to the interstate commerce act, on March 26, 1927, filed an application under paragraph (18) of section 1 of the act for a certificate, if deemed to be necessary, that the present and future public convenience and necessity require the construction by it of extensions of its railroad (*a*) from Spartanburg in a northeasterly direction to Gastonia, approximately 53 miles, in Spartanburg and Cherokee Counties, S. C., and Cleveland and Gaston Counties, N. C.; and (*b*) from Charlotte in a northeasterly direction to Winston-Salem, about 75 miles, in Mecklenburg, Cabarrus, Rowan, Davidson, and Forsyth Counties, N. C. The applicant contends that no authority from us is necessary to authorize it to construct the proposed lines, but asks that we grant a certificate, if we should hold otherwise. On April 9, 1927, the applicant filed a motion to dismiss the application for lack of jurisdiction. This motion was argued before division 4 on April 22. Subsequent to this argument consideration of the motion to dismiss was deferred until there had been a hearing on the merits. Such a hearing was held at Charlotte, N. C., from June 20 to 29, 1927.

The applicant claims that the construction proposed does not come within our jurisdiction because (*a*) the construction of the proposed lines would merely complete the applicant's railroad, the building of which (7c) was begun prior to the effective date of paragraph (18) of section 1 of the act, has been prosecuted with reasonable diligence under the circumstances, and has never been abandoned; and (*b*) that the proposed lines will form part of an electric interurban railway, not to be operated as a part or parts of a general steam-railroad system of transportation.

The applicant was incorporated in South Carolina by a special act of the legislature, adopted February 24, 1911, and amended January 27, 1927. The charter grants to the applicant "all the rights, privileges, and franchises given unto railway corporations and street

railway corporations under and by virtue of the general statutes of this State and all amendatory and supplemental acts." The applicant is specifically authorized "to construct, maintain, and operate a line or lines of railway, with one or more tracks, to be operated by electricity or other motive power" in and through certain counties in South Carolina and such other counties in the State as may be selected by the corporation, with the right "to purchase, lease, or otherwise acquire the railway and other property, including the rights and franchises, of any other railroad company or street railway company now in existence or hereafter created, in this State or in any other State of the United States" and "to" hold, possess, operate, enjoy, exercise, and dispense of the same." Sundry other powers are specifically granted.

It is urged by the applicant that its existing lines were constructed as a part of a project undertaken several years prior to the effective date of the transportation act to construct a line of railway from Greenwood and Anderson, S. C., to Durham and Winston-Salem, N. C., extending through the principal towns and cities of the Piedmont district of North and South Carolina; that this project, as originally planned, has never been abandoned; and that the work now in contemplation is a necessary part thereof. The section of the line between Charlotte and Gastonia was completed and put in operation in July, 1912; the section from Greenwood to Greenville in November, 1913, and the section from Greenville to Spartanburg in April, 1914. No mileage has since been constructed. Testimony for the applicant is that after the completion of the line between Greenville and Spartanburg further construction was deferred because of financial conditions caused by the World War; that some engineering examinations were made in 1916, but financial conditions prevented further work; that when the road was turned back to its owners at the end of Federal control the property was in bad physical condition and had less traffic than before the war; that it was necessary first to rehabilitate the existing lines and restore the traffic; that the applicant (7d) considered proceeding with the construction, but did not consider it prudent to do so because of uncertain financial conditions, high prices, and doubt as to their

continuance. It was not until near the end of 1923 that financial conditions were thought to justify proceeding with the work. The applicant then began making further surveys and studies, but claims that it was further delayed for nearly a year by the death of James B. Duke, the controlling power in the applicant's affairs.

There is much controversy in the record over the applicant's contention that the proposed lines constitute uncompleted portions of a project undertaken prior to the transportation act. On December 2, 1910, the Seaboard Air Line made a traffic contract with the Piedmont Traction Company and the Greenville, Spartanburg & Anderson Railway Company, which were controlled by the so-called Duke interests and were later acquired by the applicant. This contract recited that the two Duke companies proposed to construct, among others, a line from Charlotte, through Greensboro, to Durham, N. C. The contract provides that the Duke companies are not obliged to build any of the proposed lines, nor limited in building others. The Seaboard's representative in the protracted negotiations that led to this agreement testified that a line to Winston-Salem was never mentioned as a part of the plan. The Piedmont Traction Company was incorporated in North Carolina on January 6, 1910, with power to purchase, build, construct, and operate, by electricity or other power, street railways for the transportation of passengers, mail, express, merchandise, or other freight, with the proviso that no street-railway line should extend more than 50 miles from Gastonia. The Greenville, Spartanburg & Anderson Railway Company was afterward merged with the applicant. The Duke interests bought the street-railway lines at Anderson, Greenville, and Charlotte, and the interurban electric line from Anderson to Belton. By agreement dated January 10, 1911, the same interests formed the Piedmont syndicate. This agreement recites that the parties desire to form a syndicate to construct and otherwise acquire a system or a number of connecting lines of railway in 33 named counties in North and South Carolina, or some of them, and elsewhere in said States and other States. The named counties cover the general region served by the transmission lines of the Duke Power Company and include the counties in which the applicant now proposes to

build, and would also cover a line to Durham. The applicant relies to some extent upon this agreement as showing the intention to build to Winston-Salem and Durham. The testimony for the applicant is that the purpose of the syndicate was to build the railway lines referred to in the agreement; that meetings of business men were held and nearly 1,000 subscriptions taken; that (7e) in securing these subscriptions it was explained that the purpose of the syndicate was to build a line of railway from Greenwood to Durham "and various points on or near that line," and that the syndicate was formed as a matter of convenience to acquire certain existing properties. One of the applicant's witnesses, who is a director in the company, testified that he attended two or three meetings of business men at which Duke was present, and that he understood that the road was to be built from Greenwood to Durham; that in 1920 Duke told him that he proposed to complete the line between those points as soon as business conditions justified. The theory now seems to be that Winston-Salem is covered as one of the "various points on or near" the line to Durham. Winston-Salem was a very important city to be so treated if the definite purpose existed to build to that point, but the applicant contends that that purpose is shown by the inclusion of Forsyth County, in which Winston-Salem located, as one of the 33 counties named in the syndicate agreement, 15 of which are on none of the applicant's lines, built, proposed, or projected. In 1913 the Southern Public Utilities Company, a Duke concern, bought the street-railway lines at Winston-Salem with the intention, it is testified, that they would be used to give the railway entrance into the city. Since 1916 the map of the applicant's line, printed in the Official Railway Guide, has shown the railway as projected from Greenwood to Durham, but not to Winston-Salem. The vice president of the Seaboard testified that he first heard of the project to build to Winston-Salem in 1924, and that Duke told him then that he was not convinced that it was a good project and was not disposed to build the line if the Seaboard considered such action unfriendly. On July 1, 1914, the applicant executed a mortgage on all its property, present and after acquired, to secure an authorized issue of $50,000,000 of bonds. The mortgage recites that the com-

pany wishes to provide funds to pay for existing lines, to construct extensions, branches, and additions, and to acquire additional lines of railroad. It does not define any of the lines to be built or acquired, but the applicant asserts that its amount indicates clearly a corporate intention to build the lines now proposed. This is merely the conclusion of those interested in the applicant's affairs. While the record shows that the construction of a line to Durham was long in contemplation by the promoters of the applicant, it does not warrant the conclusion that they had any definite intention to build to Winston-Salem.

The act incorporating the applicant contains a proviso to the effect that unless the corporation shall enter and begin actual construction of the lines in any county into which it is empowered to enter, either expressly or (7f) under the general clause of the act, within 10 years from March 1, 1911, all rights and franchises given to enter that county shall expire. This limitation was removed by an amendment to the statute adopted January 27, 1927. For nearly six years the applicant had no charter power to build a line from Spartanburg to Gastonia. While the principle is settled that no one but the State can question the failure of a corporation to comply with a limitation in its charter, nevertheless the fact that the charter was permitted to lapse for six years is of evidentiary value on the claimed continuity of intention so vigorously pressed by the applicant.

Maps submitted with the application showed two divergent alternate routes between Charlotte and Winston-Salem, and it was not until a few days prior to the hearing that the applicant made its election of the route it proposed to follow. Efforts were made by the applicant to secure trackage rights over the Winston-Salem Southbound, hereinafter called the Southbound, between Lexington, N. C., and Winston-Salem, with or without a stock interest in the owning company. These negotiations were opened August 28, 1925, and ended in failure on February 18, 1927.

A corporation can act only through its directors, or its officers and agents, acting under authority of the board. Whatever intent may have existed in the minds of the applicant's promoters with respect to the proposed construction was not translated into corporate ac-

tion until November 3, 1926, when a resolution was adopted by the applicant's board of directors calling a meeting of the stockholders for the purpose of authorizing the directors to construct the proposed lines. Such stockholders' meeting was held on December 8, 1926, and the necessary authority was granted.

We have held that a certificate of public convenience and necessity is not required where construction of a line was begun in good faith prior to the effective date of paragraph (18) of section 1 of the act and was thereafter diligently prosecuted to completion, *Public Convenience Application of T., O. & E. R. R.*, 67 I. C. C. 484. *Public Convenience Application of U. & N. Ry.*, 67 I. C. C. 554. The facts do not bring the present case within the principle announced in the cases cited.

The second jurisdictional point made raises the question as to whether the applicant's lines constitute an electric interurban railway, not operated as a part or parts of a general steam-railroad system of transportation, within the meaning of the exemption contained in paragraph (22) of section 1 of the act.

(7g) One of the applicant's lines extends from Greenwood northerly to Spartanburg, S. C., 89.9 miles, with a branch from Belton to Anderson, 11.3 miles. The North Carolina segments extends from Gastonia easterly to Charlotte, 23.5 miles, with a branch to Belmont, 3.2 miles. The total mileage is 127.9 miles. The road is of standard gauge, well built according to the standards of steam-railway construction, and is operated by electric power transmitted by trolley. Between terminals it is located on private right of way. It traverses a rather hilly country, largely at right angles to the drainage, closely paralleling lines of the Southern Railway. The maximum grade, 1 per cent compensated for curvature, is about the same as on the Southern's double-track main line and was attained at the expense of rather heavy construction. The bridges are designed for the same loading as those on the Southern. The line connects the street-railway systems of the cities it reaches and performs an ordinary interurban passenger service, with stopping points averaging 1.2 miles apart. It also performs all of the essential functions of a steam railroad in competition with the Southern and the other steam lines serving the territory, and now derives about 92 per cent of its

revenue from freight. Freight revenues have steadily increased since 1913, but passenger revenues have declined heavily since 1918 and are now less than in 1913. In 1926 operating revenues were $2,517,362, of which $2,288,092 were from freight, $138,540 from passengers, $40,337 from mail and express, and $50,393 from other sources. Of 72,886 loaded cars handled, 68,370 cars were interchanged with steam railroads, most of these in interstate movement reaching all over the United States. The mean distance between scheduled stops for freight trains is about 2.8 miles, both on the applicant's line and on the corresponding mileage of the Southern. The passenger cars are generally self-contained motor units of the usual interurban type. Freight trains are hauled by locomotives weighing from 55 to 95 tons each, rated to haul from 800 to 1,200 tons. Occasionally, perhaps not infrequently, trains of 45 cars or more are hauled, using two locomotives, but the average train is 20 cars. Only 2.9 miles of the main-line mileage is in streets, and but little freight is handled through streets, except that the street railways in the cities serve to collect and distribute freight locally, providing a facility that is urged as one of the special advantages of the service over that performed by steam roads. The applicant owns and operates the street railway system at Gastonia, while the systems at Charlotte, Greenville, and Anderson are owned and operated by the Southern Public Utilities Company, which is controlled by the same interests that control the applicant. The lines now proposed would connect with local street railways also owned by the Southern Public Utilities Company, but would provide independent through tracks to move freight traffic around the (7h) cities. Most of the applicant's freight traffic is handled in cars owned by steam railroads, but the applicant owns 165 automobile cars and 99 other box cars, all of which are of ordinary steam-railway type and move freely on foreign roads.

The applicant formerly maintained a regular Pullman schedule in connection with the Seaboard Air Line. It has an extensive traffic organization for a road of its size. It is a party to the tariffs of the steam roads and to the uniform express contract of the American Railway Express Company. It is a member of the American Railway Association, the Southern Freight Association,

and other traffic organizations of the steam roads. It is represented by powers of attorney in nearly every traffic bureau of the United States, and has 502 published tariffs. In 1926 it initiated 42 changes of rates to distant points. It follows the methods of the steam roads in matters of rate divisions, interline billing, and in all relations with shippers and consignees. Its traffic manager testified that it performs all of the characteristic service of an interurban railroad and equals the service of the standard railroads in other respects—that it is an interurban railroad "and plus." Further testimony for the applicant is that its operating methods are like those of other interurban electric lines and that its operating personnel is drawn largely from street railways; that its service is different from that of the steam roads in that it is more elastic and approaches in nature a switching service over its whole line, because its freight trains are run in small units, which permits rapid switching; that freight trains are run more frequently, make more stops, and set out and pick up cars all over the line. It is also testified that we have never treated the applicant as subject to the valuation act; that the applicant is governed by our accounting rules for electric railroads; that on October 12, 1920, we made an informal ruling that the applicant was not subject to the provisions of the transportation act relating to the issue of securities; and that the Railroad Labor Board ruled that the applicant's line was an electric interurban railroad, not operated as a part of a steam-railroad system. Any informal ruling made by us to the effect that the applicant was not subject to section 20a of the act was based wholly upon representations made by the applicant and not upon a hearing or other investigation.

It appears from the record that the lines were built primarily for freight traffic. The construction is admittedly that of a standard steam railway, except in respect to power transmission. Testimony for the applicant is that when the road was built it was much better than the Southern's main line.

All of the opposing witnesses testified that there is no important difference between the applicant and the (71) steam roads in the matter of freight transportation, except the use of electric power. In November, 1920, the then president of the applicant, appearing before us in

Docket No. 11774, *South Carolina Fares and Charges*, stated that "the Piedmont & Northern Railway Company is an electrically operated railroad in that it employs electric locomotives instead of steam locomotives, and that is the only distinction between it and the steam roads." Except for the relatively unimportant passenger traffic, the functions of the applicant's line and its methods of operation do not differ materially from those of a steam road in any essential particular except in the use of electric power. The present contention of the applicant appears to be that if a railway operated by electricity performs the characteristic service of an electric interurban line it may perform in any measure all of the functions of a steam railway without coming under the provisions of paragraph (18) of section 1 of the act, unless it is operated as a part of a general steam-railroad system. All of the evidence shows that passenger traffic would be of relatively very small importance, and that the line would be designed primarily to carry freight. The applicant's line, as proposed to be extended, would connect with the Norfolk & Western and Southern at Winston-Salem and with the Georgia & Florida Railroad at Greenwood. One of the purposes for the proposed construction is to form a new through route for the movement of freight between the North, East, and West, and Florida points. The applicant estimates that the proposed construction will enable it to add to its present traffic over 82,000 carloads of freight in the first year of operation, of which over 12,000 carloads would be bridge traffic.

In *Kirkpatrick* v. *Piedmont Traction Co.*, 170 N. C. 477, 87 S. E. Rep. 232, the Supreme Court of North Carolina, in discussing the railroad of the Piedmont Traction Company, which now forms the applicant's line between Gastonia and Charlotte, said:

The defendant operates a street car line of the city of Gastonia. The defendant also operates freight trains and interurban passengers trains over this avenue in front of plaintiff's house. The defendant's line of railroad runs from Gastonia to Charlotte, N. C. Its interurban passenger cars and trains carry passengers between these two points and intermediate points. Its

freight trains likewise handle freight between these two points and intermediate points, and in addition it transfers its freight cars to the Seaboard Railway, the Southern Railroad and the Carolina and Northwestern, and these roads in turn transfer cars from their lines, loaded with freight, to the defendant's lines. It is a regular standard-gauge railway, using electricity as a motive power instead of steam. * * * We are of opinion that from the nature and description of the defendant's business, as given in the record, and the manner in which it operates its freight trains and interurban passenger trains, it should be classed as a "steam railway" and cannot be regarded as the ordinary street railway. The (7j) matter is not to be determined by the character of the motive power, but rather by the character of the business done, as well as the injury inflicted by it. * * *

The statutes of South Carolina provide that—

the phrases "Interurban Railroad" or "Interurban Railway" shall be construed to include all railroads and railways operated by electricity whose main business consists in the transportation of passengers from one municipality to another. [Code of Laws of South Carolina, 1922, Vol. 3, p. 1528.]

It appears clearly that the applicant's railroad, as proposed to be extended, would be a commercial railroad operated by electricity and not an electric interurban line within the meaning of paragraph (22) of section 1. We are of opinion that we have jurisdiction of the application.

The application has the support of the governors and utility commissions of the two States, of various municipal, civil, and trade organizations, and of many individual shippers. No opposition is voiced except by the carriers now serving the territory. The Southern Railway Company, the Atlantic Coast Line Railroad Company, the Seaboard Air Line Railway Company, the Carolina, Clinchfield & Ohio Railway, the Louisville & Nashville Railroad Company, and the Charleston & Western Carolina Railway Company intervened in opposition. These carriers, in the order named, will be referred to hereafter as the Southern, the Coast Line, the

Seaboard, the Clinchfield, the L. & N., and the C. & W. C. The applicant's railroad will be sometimes designated as the P. & N. The Georgia & Florida Railroad, hereafter called the G. & F., whose extension to Greenwood will form the southern part of the new through route which it is proposed to establish, intervened in support of the application.

The existing lines of the applicant closely parallel lines of the Southern. From Greenwood to Spartanburg the average distance between the two is about 0.5 mile; from Greenville to Greenwood about 0.13 mile, with four crossings; from Belton to Anderson about 0.4 mile. In all these cases the routes are almost identical. From Charlotte to Gastonia the average distance apart is about 2.6 miles, the maximum about 4.7 miles. This segment of the applicant's line also parallels the Seaboard closely from Charlotte to Mount Holly. The proposed line from Gastonia to Spartanburg would parallel the Southern at an average distance of about 1.1 miles, the maximum distance from any station being 3.5 miles. The proposed line from Charlotte to Winston-Salem parallels generally the Southern's main line from Charlotte to Lexington, about 51 miles. From Charlotte to Kannapolis, 23 miles, its general course is nearly straight and its maximum distance from the Southern's main (7k) line is about 8 miles, average distance 3.8 miles. For the next 22 miles northward its route lies generally within less than 0.5 mile of the Southern's main line, passing through Salisbury and Spencer; then it diverges to a point about 4 miles westerly from Lexington, the junction point of the Southern and the Southbound. From this point to Winston-Salem it nearly parallels the Southbound, at an average distance of 2.6 miles therefrom. Its average distance from the route formed by combining the Southern and the Southbound is about 2.4 miles. The Southern has a single-track line from Charlotte to Winston-Salem, which passes through Mooresville and Mocksville. The proposed route is from 0 to 13 miles easterly from this line, the average distance being about 8 miles. Only about 6.5 miles of the proposed Charlotte-Winston-Salem line is more than 4 miles from some railroad. All of the distances from other railroads, stated above, are straight-line distances.

The applicant urges that the proposed lines are

needed to add to and supplement the service of the steam railways at the points they would serve locally in common; to provide competitive railway service in the territory to be traversed; to bring rail transportation closer to parts of the territory; to provide additional sites for industrial plants; to create new through routes; to promote the further industrial development of the Piedmont section of the Carolinas by means of the above-described service; and to better assure the value of the investment in its existing lines.

It is further urged that connecting the applicant's two lines would increase their usefulness to the communities they now serve; that all of the communities most affected strongly favor the construction of both lines, as is shown by numerous interventions and all of the testimony of local witnesses; that the lines would be operated in connection with all of the existing railways and, creating much new traffic, would divert only an insignificant amount from any of them; that the prospective earning power of the lines is admitted to be sufficient and that the applicant is able to finance their construction.

The protestants contend that the existing railroads provide good and sufficient service and have a present capacity much in excess of the needs of the region; that the proposed lines would provide an unnecessary transportation service, not materially different from that of existing lines, which would injure them by diverting their traffic, being aided therein by the applicant's association with the powerful Duke interests. They urge further that this connection involves a violation of the commodities clause of the act.

There is testimony of a general nature that the industrial development of the upper Carolinas, in the Piedmont section, will require additional transportation fa-
(71) cilities, and that the applicant's railway, as proposed to be extended, would meet this need. Statistics of the past growth of industry and population are given to show the great industrial development that has taken place, especially since 1910. The applicant claims that this growth has been due in large part to the service of its railroad, and that an extension of this service as proposed is necessary to promote the further development of industry. The applicant's traffic manager testified that the great growth of the textile industry in

the territory served by the applicant was due to the construction of its railroad, and that 33 of the 63 textile mills built in this territory since 1910 are served exclusively by the P. & N. The testimony for the protestants is that the applicant's railroad was built where the industry was already most developed, and this is true in part, at least. Testimony for the Southern shows that in the period of 1912-1916 the textile industry on its lines has grown more at noncompetitive than at competitive points.

The greatest growth of the textile industry, so far as shown, has been along the main line of the Southern or very near to it. Between Greenwood and Greenville the increase appears to have been relatively small despite the service of two railroads. In the entire distance from Greenwood to Spartanburg, 93 miles by the Southern, the gain in spindles has been less than in the Southern's local territory from Concord to Burlington, N. C., 94 miles. No figures are available in the record for comparing items other than spindles.

General testimony was offered to the effect that the proposed lines are necessary to take care of the expanding textile interests; that the country between Spartanburg and Winston-Salem is developing very fast industrially, and that its agriculture is more diversified than in other parts of the South; that the increasing tendency to move industry from congested centers of the north will lead to an even more rapid development in the next eight or ten years, which will cause a parallel progress in agriculture and other pursuits; and that the only thing that could retard this growth would be inadequate transportation. The president of the Winston-Salem Chamber of Commerce testified that that city is now served by three railroad systems, but does not get the type of service that the proposed line would give; that in view of the applicant's "flexible" service it would be especially fitted to supply new industrial sites which are much needed for small industries; that Winston-Salem is served by the Norfolk & Western, hereafter called the N. & W., the Southbound, and three lines of the Southern, but that it was the view of the chamber of commerce that the more railroads the better. It is claimed that additional railroads in the Piedmont section would enable cotton manufacturers to get goods to finishing plants

(7m) quicker, and that the more railroads there are the more finishing plants will be attracted to the region.

There is no substantial evidence of a more direct nature to show that the traffic capacity of the existing railways is insufficient or will become so soon, but the applicant contends that the bridge traffic on the Southern's main line is so heavy that the Southern is even now unable to move less-than-carload freight expeditiously between local points in the Piedmont section. All of its other service is admitted to be good. As to movement from Charlotte to Winston-Salem there is no attempt to show that the Southern's single-track line via Mooresville is, or is soon likely to be, taxed by the traffic. No inherent limitations of this line are shown. It is 83 miles long, 11 miles longer than the proposed route. The Southern also moves traffic between Charlotte and Winston-Salem via Greensboro, a distance of 122 miles. Witness Green, assistant to the president of the Southern, testified that the density of revenue is greater on the Southern's line between Greenville and Salisbury than on any other part of the system but not greater than on parts of other railways in the South, and that the density of traffic is much less than on other parts of the Southern. He further testified that the facilities of the Southern have always been expanded to keep ahead of immediate needs, and are vastly so now; that with slight additions to terminal facilities its double-track line could probably handle three times its present traffic; and that between Greenville and Greensboro it could certainly handle double the present business without additional facilities. The general superintendent of the district testified that the Southern is in position to handle well three times the present traffic on its lines in the Piedmont section. The traffic density of the Southern's main line between Greenville and Salisbury in 1926 was about 2,600,000 ton-miles per mile; that is about one-half as great as between Salisbury and Greensboro and four-sevenths as great as between Greensboro and Monroe, Va. It is less than on some single-track lines of the system, which probably derive a greater proportion of their tonnage from coal and other low-grade commodities. It is shown that on certain parts of its line the Baltimore & Ohio hauls on a double track from 9 to

10 million ton-miles per mile, under conditions considered fairly comparable with those on the Southern's main line. Train density is probably a better gauge of the proportion of potential capacity used. In March, 1927, the average number of trains, in both directions, was from 27.5 to 31 a day for different segments of the line between Greenville and Salisbury, from 37 to 42 between Salisbury and Lynchburg, Va., and from 55 to 65 on segments between Orange, Va., and Washington, D. C. It is apparent that the train movement between Greenville and Salisbury is small in proportion to the (7n) capacity of a double-track line. The number of freight trains is much smaller than on some of the Southern's single-track lines. The potential capacity of the Southern's line between Washington and Atlanta, Ga., is estimated at about 144 trains a day. In 1926 the traffic density of the Southern's more direct line between Charlotte and Winston-Salem was about 1,160,000 ton-miles per mile between Charlotte and Mooresville and about one-half as much north of Mooresville. In March, 1927, the average number of trains daily was 13.6 on the first of these segments and 9.8 on most of the second. The record does not show the physical characteristics of this line, but it appears probable that a single main track on this route could carry three times the present traffic if provided with a reasonable number of sidings and other appurtenances.

That the Southern has pursued a liberal policy which has done much to promote the industrial growth of the Piedmont section, and that its service is good, except in certain claimed deficiencies in the local movement of less-than-carload freight, is sufficiently shown by the applicant's witnesses, considering their testimony as a whole. The testimony for the Southern is that its through-freight movement does not interfere with the handling of its local freight, and the record indicates that no serious interference should be necessary. The total number of freight trains in both directions averaged from 9.6 to 12.8 a day in March, 1927, upon different segments of the line between Greenville and Salisbury.

An owner of cotton mills located at various points on the Southern testified that the development of the textile industry is apt to be along the lines of finishing

plants to which the present mills would furnish material, and that quick service is of the greatest importance in handling shipments to these plants. Another cotton manufacturer says that one of the problems of the manufacturers is finishing their goods; that if they had other rail lines they could get goods to finishing plants more quickly and would be better able to compete with New England mills, which are located very close to finishing plants; and that the more railroads they have the more finishing plants will come to their territory. The claimed urgency of this problem does not appear to have prevented the industry in this region from growing much faster than that of New England. The establishment of finishing plants in the South has begun very recently. It is testified that the object of moving finishing plants to the South is to put them closer to the products they treat, and that time is more important than freight rates in that connection.

Considerable testimony was offered with respect to delays in the movement of local less-than-carload freight by the Southern, particularly in the territory between Greenville and Greensboro. Various witnesses testified (70) to such delays, the instances referred to being taken at random. They show some very slow less-than-carload movement by the Southern and some much faster by the applicant's line. The general manager of a yarn-dyeing plant at Greenville testified that time was of first importance in his work because goods are now marketed on a quick turnover, orders being very small as compared with those of 10 years ago. The testimony for the Southern is that the hand-to-mouth buying that has become common has been made possible largely by its own improved service. The traffic manager of the Spartanburg Transportation Association testified that the applicant has closer contact with shippers than the Southern and that its service is more satisfactory for short hauls. One of the applicant's directors, who is interested in six cotton mills at Gastonia, three of which are served exclusively by the Southern and one of its subsidiaries, testified that the Southern had given excellent service in his section since the applicant's line came there. Another of the applicant's directors stated that the service given by the Southern to the Piedmont section had been good as a whole, but not so good as that of the applicant.

A wholesale druggist and banker at Charlotte testified that so far as his experience is concerned the Southern gives thoroughly satisfactory service for incoming freight from the North and for all outbound freight except to points between Charlotte and Greensboro; that there have been serious delays in delivering less-than-carload freight to Salisbury, High Point and Lexington, in particular; and that he has had to ship to these points by truck or express when time was important. He claims that the rail service has been slow for 25 years, but says that it has improved very lately. He admits that the Southern is a fine railway, that it has contributed substantially to the remarkable development of the region, and that its service has improved as its revenues increased. Lexington is nearer to Greensboro and Winston-Salem than to Charlotte. No matter how much rail lines may be multiplied, it is probable that within certain ranges movement by truck will be quicker and will be resorted to in the competition of rival distributing centers. The use of truck has increased lately notwithstanding some concurrent improvement in railway service. The construction of hard-surfaced highways in North Carolina has facilitated trucking, which has come into general use in competition with railroads for hauls up to 50 miles.

The chairman of the transportation council of the Winston-Salem Chamber of Commerce, a witness for the applicant, testified that the service of the Southern is generally fine, and that on local shipments passing through junction points it is generally, but not always, satisfactory. Another witness from Winston-Salem ex- (7p) pressed the view that the applicant's proposed line could move freight between Winston-Salem and Gastonia and Greenville in from 24 to 48 hours, and that this shows the need for the construction proposed. The secretary of a hardware jobbing house at Winston-Salem testified to delays in shipments to Charlotte, Gastonia, and other North Carolina points south of Salisbury, and expressed the opinion that the construction of the new line from Charlotte to Winston-Salem would eliminate these delays. If Winston-Salem now competes with Charlotte to the extent of shipping hardware into and through that city it would not appear that it had been put to much disadvantage because of the lack of

additional rail lines between these points. Notwithstanding all of the testimony of the applicant's witnesses with respect to the local movement of less-than-carload freight, the freight-traffic manager of the Southern testified that he had not heard any complaints prior to the hearing in this proceeding. If delays of the character testified to by the applicant's witnesses occur, for which the carrier is responsible, administrative remedies for their correction are available.

Freight traffic of the territory served and proposed to be served by the applicant consists of coal, raw materials, supplies, and miscellaneous traffic inbound, and textile and other manufactured products outbound. The outbound movement consists largely of less-than-carload traffic for distant destinations. The local less-than-carload traffic is said to be less than 1 per cent of the total. Except in a few instances, the mills are served by private sidings, and the Southern's freight-traffic manager was of opinion that more than 99 per cent of all parcel freight handled by the Southern and the applicant from cotton mills is loaded on cars placed on these sidings. The practice of the mills is to load from their own platforms all the outbound freight they have at the time of loading, provided it amounts to 10,000 pounds or more. In some cases the cars are so loaded that they can be moved directly, without breaking bulk, to specified destinations, or to distant break-bulk or transfer points, or to ports for transfer to steamers. In other cases they contain shipments for many destinations, so that they must be taken to a transfer point. To expedite freight movement the Southern has established two major transfer facilities, viz, Spencer Transfer, near Salisbury; and John Sevier Transfer, near Knoxville, Tenn. There are auxiliary transfers at Columbia, S. C., Hayne (near Spartanburg), Atlanta, Ga., Cincinnati, Ohio, and elsewhere. Spencer Transfer comprises a yard with warehouse and platform capacity to handle 250 carloads of freight at one time. Less-than-carload freight to and from the Piedmont section is there assembled and loaded according to destination, and dispatched in solid carloads to be moved without breaking bulk either to final desti- (7q) nation of the shipments, or as far as possible toward it. The number of destinations for which carloads can be made up depends on the volume of traffic. Accord-

ing to the car roster now in use, cars are placed daily for 172 different destinations or break-bulk points, and more cars are supplied when needed. Cars to distant points are not run with less than about 10,000 pounds load, but cars are loaded with as little as as 3,000 or 4,000 pounds to points in the local territory. The Southern reaches by its own lines every important city south of the Ohio and Potomac Rivers, except Roanoke, Va., Wilmington, N. C., and Nashville, Tenn. Cars are provided to a number of gateways of the Southern's system, and to many points beyond, including Baltimore, Philadelphia, New York, Boston, Wilkes-Barre, Harrisburg, Pittsburgh, Buffalo, Detroit, Chicago, Kansas City, Houston, Key West, and others. Cars are also provided to a large number of points in the Carolinas, Virginia, and Georgia. Solid cars of merchandise from all over the country, destined to points in the Piedmont section, are broken up at Spencer Transfer for distribution. Peddler cars are made up daily, except Sunday, for each of the freight districts on the Southern's lines in the Piedmont section, and these cars are handled in through trains except in the district for which they are made up. Twenty-eight scheduled freight trains are operated out of Spencer Transfer daily, and there is one local freight train each way over each freight district. More have been run when necessary. Shippers in the Piedmont section often load a car solid with goods for various destinations and route it through Spencer Transfer.

Spencer Transfer was established in 1907. John Sevier Transfer was opened about two years ago to expedite the movement of the increasing volume of traffic to the West. On a representative day, May 31, 1927, Spencer Transfer loaded 256 cars to destinations in 17 States. The average distance traveled by these cars was 264.5 miles, and their average time to destination two days. Spencer, John Sevier, and Hayne Transfers together loaded 424 cars. The testimony for the Southern is that its extensive package-car freight service, operated by means of this system of transfers and fast-scheduled through-freight trains, gives shippers the advantage of quicker time and avoids the damage that would otherwise occur in transferring less-than-carload freight at junction points that this improved service, together with the liberal rate policy pursued by the Southern to promote

industry on its lines, has enabled the textile and furniture manufacturers of the Piedmont section to build up their trade in competition with New England and Grand Rapids, Mich., and has contributed much to the general
(7r) progress of he region that this service is possible only because of the Southern's extensive mileage and facilities and the amount of traffic available, and would necessarily be restricted and impaired if the volume of traffic were reduced substantially, because it would then be impossible to make up package cars for so many destinations. The applicant tries to show that the system of transfers has sacrificed the speed of local less-than-carload shipments in the Piedmont section and there was some testimony to this general effect. The Southern's witnesses deny that the movement of its local freight is delayed in general by the operation of the transfers, but admit such delays have occurred in some instances through faulty methods in loading which the company is striving to correct. Their testimony is that the use of Spencer Transfer for local shipments between points in near-by territory is a limited and secondary use which is not encouraged by the Southern; that it is usually quicker to send such shipments direct; and that when they are so handled the service is quick and has not given rise to complaints. Sometimes a mill puts into a full car all of the shipments it has for the day without respect to destination. The car so loaded must be taken to Spencer or some other transfer point, and some of its contents may require a back haul. Shipments to finishing plants are sometimes delayed in this way. Most of the less-than-carload freight handled by the Southern in the Piedmont section is carried to Spencer Transfer. An executive officer of the Southern testified that the company has as complete a system as he can conceive of to collect and distribute the traffic of the Piedmont section, and that it gives as good service at noncompetitive as at competitive points, as this is necessary to permit competition with New England. He describes the competitive rates the company has made in pursuance of a policy to build up industry on its lines. When the company was organized in 1894 there were but few industries on its lines. It made very low rates on cotton to the mills, and made rates on cotton goods from the mills to New York and New England lower than the rates on

cotton to the same destinations. It made rates on furniture to allow competition, first with the makers of cheap furniture in the East, and later with Grand Rapids, so that furniture from North Carolina is now sold in the territory near Grand Rapids. The freight-traffic manager of the Southern testified that the applicant handles freight traffic just as the steam railroads do, and that its haul is so short that it could not affect materially the service in long-haul traffic.

Among other reasons, the applicant claims that the proposed extensions are necessary because of the peculiar nature of the service they can render, which differs from that of steam railways. Most of the testimony on this point concerns the movement of freight. Testi- (78) mony for the applicant is that its freight service is more elastic and flexible than that of steam railways. The president of the applicant testified that the Piedmont section needs a very flexible railroad service because its industrial development is scattered; that the few stops made by the steam lines congest industries into cities; that industries are unable to pay the high cost of land; and that there is an active demand for new industrial sites. He says that the ability of an electric line to operate over sharper curves and steeper grades gives it an advantage in reaching industries and business establishments, and that the applicant has given local jobbers quicker and better service than they formerly had. On behalf of the protestants if is testified that dummy steam engines can be run over any curves that standard freight cars will pass over and that such engines are used in several cities by some of the protesting carriers. It is claimed that closing the gap between the applicant's two lines would improve their service. This would appear to apply chiefly to local movement between points on the two segments.

Witnesses for the protesting railroads deny that the applicant's freight service differs materially from that of the steam roads, and witnesses for the Southern say it is not more flexible than that of their road. The Southern contends that the growth of industry on its line at noncompetitive points indicates that its service is good and not inferior to that of the applicant. It is admitted that the aplicant has a more frequent local freight service. Another advantage claimed is that freight-train

stops are at shorter intervals of distance. The Southern denies this. Leland's list of open and prepay stations shows 61 stations on the applicant's lines and 39 on the corresponding mileage of the Southern. According to time tables published by the two roads for the guidance of their employees, the average interval of distance is 2.8 miles for each road. This comparison covers 114.3 miles of the applicant's railroad, omitting the two branch lines. For the applicant's line between Charlotte and Gastonia, for which no freight time-table is published, the stops were taken from the passengers time-tables. The applicant has more listed stations at which freight is received and delivered than the Southern. So far as the record shows some of these may be mill sidings that the Southern does not list in the same way. In a country well supplied with good roads, the station interval on the Southern appears short enough to cover ordinary needs well, particularly as cars on mill sidings are handled wherever placed. Excepting the proper handling of local less-than-carload freight any advantages shown for the applicant's freight service are of minor importance.

Every point of any importance now reached by the P. & N. except Mount Holly and Anderson, was served (7t) by the Southern before the P. & N. was built, and is still served by it. Mount Holly was and is served by the Seaboard, and Anderson by the Blue Ridge Railroad, a subsidiary of the Southern. The only new town ever established on the P. & N. is Lyman, S. C., which is also on the Southern's main line. There is no gateway or territory open to the applicant that is not already served by the Southern and its connections.

Some stress is put upon the need of the proposed new lines to supply industrial sites, particularly at stream crossings, for which there is said to be an active demand. Water is needed for plant operations and not for power purposes. Past and prospective industrial growth is based largely upon the use of electric power distributed by the Duke companies, which are planning the early construction of three large auxiliary steam plants on the proposed lines, and have projected additional plant construction to about 1932. Testimony for the applicant is that conditions along the proposed line to Winston-Salem are more favorable for mill sites than

between Charlotte and Gastonia. The vice president of the Southern in charge of traffic testified that he had never before heard it suggested that a new railway is needed in Southern territory to accommodate industries seeking to build plants, and that there are innumerable sites available. Another witness for this protestant says that the Southern crosses the same streams that would be crossed by the applicant's proposed line, and offers the same opportunities for industrial development; that industrial development in the South is going generally along the Southern, in its local territory; and that a number of mills have been built along rivers to be served by spurs or branches from the Southern and other railways. The freight-traffic manager of the Coast Line, which owns a half interest in the Southbound, testified that industrial sites are plentiful along the Southbound; that the line of that carrier parallels the Yadkin River for about 13 miles, and crosses or skirts a number of streams; and that a number of industrial sites are available along its Nissen spur in Winston-Salem. It is shown that, outside of Winston-Salem, there have been 32 industries, mostly of a minor kind, established along the Southbound in the last seven years. There has been no remarkable industrial growth along the Southbound that could indicate a need for additional rail facilities. On the Southern's Charlotte-Winston-Salem line there is only one textile mill between Mooresville and Hanes, the latter being a station close to Winston-Salem. This is a distance of about 50 miles, in which the line crosses the Yadkin and South Yadkin Rivers and a number of their tributary creeks. The testimony as a whole does not establish that the need for new industrial sites is im-
(7u) mediate or pressing. The country is wide and is covered generally by electric-power transmission lines.

A claim is made that the proposed Charlotte-Winston-Salem line is needed because it would provide a shorter and quicker connection between its termini, the two largest and most rapidly growing cities in North Carolina. Charlotte is served by the Seaboard, the Norfolk Southern, the applicant, and three lines of the Southern. Winston-Salem is served by the N. & W., the Southbound, and three lines of the Southern. The applicant, in its supplemental return to our questionnaire, shows the population of places along its proposed Charlotte-

Winston-Salem line, named in geographic order, as follows: Charlotte 50,780, Derita 103, Kannapolis 7,050; Landis 972, China Grove 1,027, Salisbury 16,310, Spencer 2,510, Yadkin 25, Tyro 25, Winston-Salem 58,230. The figures are from the United States census of 1920, except for Yadkin and Tyro. These two villages, with a combined population estimated at 50, are the only places on the proposed line that are not on the Southern. All of the others, except Derita and Winston-Salem, are on the Southern's double-track main line. Salisbury is at the junction of the Southern's Asheville-Morristown line with its Washington-Atlanta line. At Barber, about 11 miles west of Salisbury, the Asheville-Morristown line intersects the Southern's Charlotte-Winston-Salem line. There are two rail routes between Salisbury and Winston-Salem, one by Barber and one by Lexington, both requiring change of train. A third route exists via Greensboro, but it is quite indirect. The cities are connected by a hard-surfaced highway which passes through Lexington.

An agricultural extension agent at Salisbury, a witness for the applicant, testified that the country from Spencer to Winston-Salem is rugged, that the soil is not fertile, and that there has not been much recent progress in agriculture; that the farmers raise general farm crops, especially those that can be hauled to shipping points at least cost, tobacco in particular; that the raising of livestock and poultry is rather on the increase; and that additional transportation facilities would prove a convenience for marketing crops and for bringing in supplies, and would promote greatly the development of the country.

With respect to mineral deposits it is testified that the proposed Winston-Salem line would make available large deposits of clay for brick and tile, of limestone, and of building sand and stone, for all of which there is a large and growing demand. No evidence is offered as to the size or location of these deposits. The owner of a granite quarry served by a spur from the Yadkin Railroad, 5 miles southeasterly from Salisbury, says that (7v) Rowan County has a granite belt 9 miles long by from 0.5 to 1.5 miles wide, now crossed only by the Yadkin Railroad, and that another railroad entering the territory would undoubtedly cross the granite belt and

greatly facilitate its development. He admits that he does not know where the applicant's proposed line would be located. As it would run close to the Southern in this section it would not open up any new territory. There is no other testimony as to mineral resources between Charlotte and Winston-Salem, except that the proposed route passes a granite quarry that now trucks to Winston-Salem. No idea of its size is given or of the length of haul. There is testimony that there is some timber in the region, but it does not appear that this is very important.

An exhibit introduced by the applicant shows that in 1920 the value of farm crops in the counties between Charlotte and Winston-Salem, i. e., Cabarrus, Davidson, and Rowan Counties, was slightly less, per square mile of total area, than the corresponding average for the State of North Carolina, notwithstanding the nearness of this section to industrial towns. Per capita the value of agricultural products of these counties was approximately one-half as great as for the State.

The population of the cities, towns, and villages along the proposed line from Spartanburg to Gastonia, according to the United States census of 1920, is shown as follows: Spartanburg 24,483, Cowpens 1,284, Gaffney 5,065, Blacksburg 1,512, Kings Mountain 2,800, and Gastonia 12,871. All of these points are on the Southern's Washington-Atlanta double-track line and on the hard-surfaced highway which parallels it closely from Spartanburg to Greensboro. The testimony for the applicant is that the territory between Spartanburg and Gastonia is less highly developed industrially than that on each side of it, which is served both by the applicant's railroad and the Southern's main line. It has less industry than the territory between Gastonia and Charlotte, but it does not appear that it is less developed than the territory between Spartanburg and Greenville. Little information is given about the agricultural development in this section, but the country appears to be superior in this respect to that between Charlotte and Winston-Salem.

Little testimony was offered to show the need for interurban passenger service over the proposed lines. One of the applicant's witnesses testified that passenger transportation would not be so important, because of the

competition of busses and automobiles over the good highways, but that there would be a certain amount of passenger transportation that would help the general progress. Other testimony is to the effect that the exten-
(7w) sions would enable the applicant to get back a heavy passenger traffic that has been diverted to the highways; that the Winston-Salem extension would pass through a prosperous and thickly populated territory, a part of which is remote from steam railways; that the present minimum time between Charlotte and Winston-Salem is 3 hours 27 minutes; and that the applicant would cover it in 2 hours 20 minutes. The time by bus is not stated. No point in this territory is distant more than 7 miles, in a straight line, from existing railways. The traffic estimate for the proposed lines for the first year of operation shows 440,785 passengers, $196,502 passenger revenue, and $70,261 express revenue. Passenger and express revenues combined amount to about 7 per cent of the total gross revenue expected. There are two passenger trains each way daily between Charlotte and Winston-Salem via Mooresville. Passenger stops on the extensions would be at the same average interval as on the applicant's existing lines. The passenger service of the proposed lines would be of some benefit to the region served, but little need for it exists.

One of the objects of the new construction proposed is to form a through line from Greenwood to Winston-Salem. The applicant's proposed northern extension would connect with the N. & W. at Winston-Salem. No contract has been made between the two companies, but there have been conferences at which the applicant has received some assurances from N. & W. officials. One of the reasons for deciding to build to Winston-Salem now is the increase of coal traffic to the Carolinas, which will grow rapidly in the near future, particularly in view of the Southern Power Company's plans to build three large auxiliary steam plants, each of which is expected to consume 3,600 tons of coal a day.

The G. & F., an intervener in this proceeding, owns and operates a railroad from Madison, Fla., where it connects with the Seaboard, to Augusta, Ga., 250 miles, with 194 miles of branch lines. It is now extending its main line northward to Greenwood, 56 miles, where it will connect with the applicant's railroad. So far as the

record shows the applicant has not had any negotiations with the G. & F. As heretofore stated, the applicant estimates that its bridge traffic will amount to 12,300 carloads in the first year of operation, all of which could be handled by existing railways. The nature of the products composing this 12,300 carloads seems to indicate that the southbound tonnage would much exceed the northbound, and that a relatively small part would come from the G. & F. One of the applicant's witnesses testified that the extension to Winston-Salem would facilitate the use of the Hagerstown, Md., gateway between the Piedmont section and the North; and that shippers who could use it have found this gateway valuable in times of traffic trouble, when there was difficulty in (7x) moving freight via Washington or Norfolk. He admits that the Hagerstown gateway is open via Winston-Salem to shippers on the Southern and Seaboard, but states that it is not open to shippers on the applicant's railroad, meaning, perhaps, that it is not open to such shippers without movement over connecting lines that would be disposed to favor routes that give them longer hauls. A representative of Coverdale & Colpitts, engineers, testifying for the applicant, admits that there is some possibility of a new competitive route between Hagerstown and Florida via the applicant's line. He says that there are three trunk lines operating through the Carolinas now, and that he has not given sufficient study to state whether a fourth trunk line should be formed. He estimates that the applicant's bridge traffic would be increased by 16,600 carloads a year through the proposed extensions, all of which would be diverted from other lines. It is further testified by this witness that the present routing of coal through Richmond, Va., and Durham to points on the P. & N. is very indirect and unnatural; and that the route through Winston-Salem would be the natural one, irrespective of any community of interest. It appears that this long routing is used because of an agreement between the applicant and the Seaboard under which the coal movement is diverted from the much more natural route via Winston-Salem and the Southern. The applicant's general freight and passenger agent testified that distances from Madison, Fla., by the new route would be as follows: To Hagerstown 903 miles, and to Cincinnati 1,097 miles, both via

Winston-Salem; from Madison to Norfolk via Charlotte and the Norfolk Southern, 880 miles; from Savannah, Ga., to Cincinnati, via Winston-Salem, 988 miles. He concludes that these figures show that a large competing transportation system would be set up, affording at all times ample competition between the carriers in serving the southern territory, which must result in tremendous benefit to the shipping public of the Southeast. He does not show the mileage by existing routes, and offers no other measure of transportation economy. He submits a railway junction-point map of the Southeast, upon which he has shown the proposed routes. So far as may be judged from this map, the routes he has mentioned are all much less direct than others that now exist. Possibly the route to Hagerstown may be excepted, but in this case also existing routes appear to be somewhat shorter. Moreover the advantage of using the Hagerstown route, as compared with Washington or Norfolk, has not been shown, and can not be presumed. A representative of shippers and receivers of freight in eastern North Carolina expressed the view that the competitive through route to be formed by the proposed extension might use the Norfolk Southern from Charlotte to Norfolk and intermediate points, thus strengthening that line (7y) to the benefit of the country it serves. It appears likely that the applicant would give all traffic bound to or through Norfolk to the N. & W., as it would thus secure the maximum haul on its own line.

The protestants contend that there is no public necessity for the through route that would be formed by connecting the N. & W. and the G. & F.; that this would mean another through trunk line between the North and South, whose traffic would all be at the expense of existing lines; that such diversion of traffic would not benefit the public, but would cripple the existing trunk lines; that it would further strengthen the applicant in the matter of rate divisions, since the applicant would prefer its terminal connections, and it would be difficult for other connecting lies to offer it divisions high enough to secure any traffic that it could deliver to the N. & W. or G. & F. The applicant now gets divisions of from 40 to 50 per cent on all traffic it handles in connection with the Seaboard, although the applicant's average haul on all its freight is only 28.8 miles, and the greater part

of the traffic handled is long-haul business. The average freight haul on the Southern in 1926 was 187.43 miles, and it is testified that the average haul on traffic into and out of the Piedmont section is as much. The Southern and other lines have met these divisions, but secure only a small part of the traffic the applicant controls. It is admitted that the Southern and its connections reach all of the principal gateways to or through which the applicant's interchange traffic moves, and that the Southern itself reaches most of them. In 1926 the applicant delivered 17,158 loaded cars to the Seaboard, 2,499 to the Southern, 167 to the C. & W. C., and 841 to the Clinchfield. It received 34,721 from the Seaboard 6,483 from the Southern, 1,029 from the C. & W. C., and 5,472 from the Clinchfield. The vice president of the applicant admits that the Southern could handle all of the interstate traffic that is handled by the applicant. His testimony is that from 12 to 15 per cent of the applicant's traffic is intrastate.

Witnesses for the Southern testified that all shippers on the P. & N. and those on the Southern in the territory which the applicant proposes to enter, can now ship through Winston-Salem to Hagerstown, Cincinnati, Chicago, or any other point that could be reached through that gateway, and that the proposed extensions would not give them any advantage in reaching any point beyond the local territory. The Southern has two scheduled freight trains each way daily between Charlotte and Winston-Salem, where direct connection is made with the N. & W. The time of these trains is from six to seven hours. The Southern's through freight service into and out of the Piedmont section reaches Norfolk, Richmond, and Potomac Yard (Washington) on the north (7z) and east; Cincinnati, Louisville, St. Louis, Knoxville, Chattanooga, and Memphis on the west; and Birmingham, New Orleans, Atlanta, Macon, Augusta, Jacksonville, Brunswick, Savannah, and Charleston, on the south. The following table shows comparative distances by the proposed Winston-Salem route and by the existing short route to points taken as typical of the Middle West. Column A shows the short route, and Column B the proposed Winston-Salem route.

| From— | To Cincinnati | | To Chicago | | To Detroit | |
|---|---|---|---|---|---|---|
| | A | B | A | B | A | B |
| | *Miles* | *Miles* | *Miles* | *Miles* | *Miles* | *Miles* |
| Charlotte, N. C. | 554 | 648 | 839 | 933 | 812 | 821 |
| Spartanburg, S. C. | 479 | 724 | 764 | 1,009 | 737 | 897 |
| Greenwood, S. C. | 568 | 813 | 853 | 1,098 | 826 | 986 |
| Augusta, Ga. | 612 | 870 | 897 | 1,155 | 870 | 1,043 |
| Savannah, Ga. | 724 | 1,002 | 1,009 | 1,287 | 982 | 1,175 |
| Vidalia, Ga. | 655 | 971 | 912 | 1,256 | 913 | 1,144 |
| Valdosta, Ga. | 715 | 1,092 | 972 | 1,377 | 973 | 1,265 |
| Jacksonville, Fla. | 806 | 1,168 | 1,063 | 1,453 | 1,064 | 1,341 |

The proposed route via the Clinchfield and the L. & N. hereinafter referred to will be materially shorter from these midwestern points to Charlotte, Spartanburg, Greenwood, and Augusta, than the applicant's Winston-Salem route, except from Charlotte to Detroit, where the proposed Winston-Salem route would be 27 miles shorter. The L. & N. route via Atlanta or Birmingham is more than 200 miles shorter from Augusta, Savannah, Vidalia, Valdosta, and Jacksonville to Cincinnati and Chicago, and from 128 to 281 miles shorter to Detroit than the proposed route via Winston-Salem. Elements other than distance that affect the comparative cost of transportation are not shown.

No evidence was introduced by the G. & F. In its brief it contends that the proposed routes are necessary to provide independent and competitive through routes between the South, East, and West via the Norfolk Southern and the N. & W.; that they would also supply local needs for transportation; that the volume of new business in prospect is sufficient to justify the proposed expenditure; that the extensions will materially benefit the G. & F., a comparatively weak line; that the loss of traffic to the protesting carriers would not impair their ability to serve the public; and that the whole theory of the law is to promote competition rather than to strangle the country by monopoly.

The Seaboard objects to the proposed construction as unnecessary, and because it would divert traffic from its line. Its vice president testified that the proposed extensions might divert from the Seaboard 60 per cent of the traffic it now interchanges with the applicant; (7aa) and that in 1926 the Seaboard's revenue from this traffic amounted to $2,408,958.75. The Seaboard would sustain a further loss by the diversion of traffic to the applicant's railroad as a bridge line between the G. & F. and the N. & W.

The Coast Line also objects to the proposed construction chiefly on the ground that the formation of the proposed new through route is unnecessary and would seriously affects its revenues, as it would short-haul its line on traffic to and from Georgia and Florida. It now interchanges with the G. & F. at Augusta. This interchange is limited to traffic between Georgia and Florida points and the Carolinas and the East. The testimony

is that the Coast Line would not voluntarily open joint through routes between south Georgia and Florida points and points west of Spartanburg and north of Winston-Salem in connection with the G. & F. and the P. & N.; that it would oppose the opening of joint through routes via Willacoochee, Ga., G. & F. to Greenwood, P. & N. to Charlotte, and Norfolk Southern to Norfolk; and that if a route via Willacoochee and Greenwood were forced, its haul from Jacksonville would be only 118 miles instead of 662 miles to Richmond, or 434 miles to Wadesboro, N. C., the southern terminus of the Southbound. The Coast Line, the Florida East Coast, and the Seaboard have spent large sums in recent extensions and improvements to promote the development of Florida and handle its traffic with the North. Florida traffic was the most important factor in bringing about the double-tracking of the Coast Line from Jacksonville to Richmond. The Coast Line and the N. & W. each own one-half of the capital stock of the Southbound, whose line extends from Wadesboro to Winston-Salem, 90 miles. They built the line jointly to form a connection, particularly to haul coal south and incidentally to develop the local territory. It is largely a bridge route, its average freight haul being 74.7 miles in 1926. Winston-Salem is the most important point on its line and supplies most of its traffic other than bridge traffic. Development at other points during the past seven years appears to have been moderate. The Southbound has not been directly profitable to the Coast Line, has not paid any dividends, and has only shown an income credit balance during the last two years. The profit and loss debit balance on December 31, 1926, was $272,833.35. No complaints have been made of the Southbound's service. The freight-traffic manager of the Coast Line testified that he was convinced that the opening of new routes via the G. & F. and the P. & N., as proposed to be extended, might cause a loss to the Southbound of 48 per cent of its present revenue.

The L. & N., the Clinchfield, and the C. & W. C., all of which are closely allied with the Coast Line, object (7bb) to the proposed extensions for the reasons that they would not serve any public necessity and would divert traffic from their lines and from the projected routes of the L. & N. in connection with the Clinchfield. The L. & N. and the Coast Line have jointly leased the Clinch-

field, assuming thereby financial obligations of approximately $53,293,000. The Clinchfield's line extends from Spartanburg northerly to Elkhorn City, Ky., nearly 300 miles, where it connects with the Chesapeake & Ohio. The L. & N. depends largely on revenue from hauling coal. It serves four large coal fields, of which the eastern Kentucky field is the greatest. The chief objects of the L. & N. in leasing the Clinchfield were to open up new and shorter routes between the eastern Kentucky coal fields and Carolina points and to create a new merchandise route between Kentucky, the Ohio River crossings, and Central Freight Association territory on the one hand and Carolina points on the other. To carry out this purpose it is necessary to connect its lines with the Clinchfield. In Finance Docket No. 5322, *Construction and Operation by L. & N. R. R.*, 124 I. C. C. 581, decided May 26, 1927, we authorized the L. & N. to build a line, 13.87 miles long, from Chevrolet, Ky., to Hagans, Va., connecting its southeast Kentucky or Harlan County line with its southwest Virginia line, which connects at Norton, Va, its eastern terminus, with the Interstate Railroad. The estimated cost of this construction was $5,287,000. Authority was also granted to operate under trackage rights over the Interstate Railroad between Norton and a connection with the Clinchfield. The full plan adopted by the L. & N. provides for a direct connection between its Harlan County line at Chevrolet and the Clinchfield at Speers Ferry, Va. This line would be 50.13 miles long and is estimated to cost $15,683,000. The plan also provides for a connecting link betwen the two L. & N. lines in eastern Kentucky, so that both may be connected with the Clinchfield. This connection would be 18.13 miles long and is expected to cost $6,967,500. The ultimate plans for connecting the L. & N. lines with the Clinchfield therefore involve an estimated expenditure of more than $22,000,000 for new lines. The L. & N. represented in the case last cited that in view of the uncertainty as to the amount of traffic available it would not be justified in carrying out the full plan immediately. The route through Norton by the connection heretofore authorized will shorten the haul on coal from Harlan to Marion, N. C., and to Spartanburg 100 miles and 69 miles, respectively. It was estimated that within a short time after this connection was established the L. & N.

would handle about 2,100,000 tons of coal a year over it from the Harlan County field to the Carolinas, as compared with about 300,000 tons moved in 1925 by the company's present circuitous routes. The testimony is that in making its application in Finance Docket 5322 the L. (7cc) & N. had no knowledge of a plan to connect the P. & N. with the N. & W. and G. & F., or either of them, and did not take into consideration the diversion of traffic from the Clinchfield route that would follow. The assistant to the vice president of the L. & N. in charge of traffic testified that the applicant's proposed Winston-Salem line would be only 11 miles shorter than the Southern's existing line; that its construction would not bring about any reduction in rates on coal; that it is clear that the applicant expects the Duke Power Company and affiliated interests to get all coal hereafter from mines on the N. & W.; and that connecting the P. & N. with the N. & W. would result, because of various influences, in diverting to the P. & N. considerable traffic, both coal and merchandise, now handled by the Clinchfield. In 1926 the Clinchfield delivered to the applicant, either directly or through the Seaboard 3,832 carloads of coal, of which 1,581 cars were destined to two of the Duke plants. It handled to and from points beyond its northern junctions 5,539 carloads of freight other than coal and 4,693,342 pounds of less-than-carload freight to and from points on the P. & N. or passing over it. The witness believes that most of this traffic would be jeopardized, probably diverted. On cross-examination he admitted that the rates on coal to points on the P. & N. are 20 cents a ton less from the Clinchfield than from the N. & W., and that probably the greater part of the coal for Spartanburg and points south on the applicant's line would still be taken from the Clinchfield unless mines on the N. & W. should absorb the difference. In 1926, 2,983 carloads of coal were moved by the Clinchfield to the applicant's South Carolina division. It is further testified that the applicant for many years has controlled a very large part of the traffic to and from points on its lines; that if its lines are extended the same influence will close most of the traffic to ordinary solicitation by present transportation routes; that the coal traffic controlled by the Duke interests would be largely diverted to the new route via Winston-Salem; that it would be

difficult, if not impossible, to allow the applicant as large divisions for movements by other routes; that existing routes are sufficient to handle all traffic for many years to come and are generally shorter than those which the applicant would establish; and that the new merchandise routes from the Carolinas via the Clinchfield and the L. & N. will be generally much shorter than those the applicant would create via Winston-Salem.

The Clinchfield has filed a brief in its own behalf. This is confined to the effect the construction of the proposed lines would have on its own road. The nature of the objections offered and the evidence relied upon have been shown sufficiently by the testimony for the L. & N. One of the applicant's witnesses testified that his company (7dd) intends to continue to interchange traffic with the Clinchfield at Spartanburg after its proposed lines are built, and that he expects this interchange to increase in volume. This testimony might be more impressive if witnesses for the applicant had not testified that all of the steam railways serving the territory, the Southern included, would benefit by the construction of the proposed extensions.

The C. & W. C. is allied closely with the Coast Line and the L. & N. Its railroad extends from Spartanburg, through Greenwood and Augusta to Port Royal, S. C., 247 miles, with one branch line from McCormick to Anderson, S. C., 59 miles and another from Laurens to Greenville, S. C., 36 miles. Connection is made with the Coast Line at Augusta and at two points between Augusta and Port Royal, and with the Clinchfield at Spartanburg. Other connections are generally with competitive lines. The railroad was built about 42 years ago through a rather sparsely settled part of South Carolina. The testimony is that it was exceedingly unprofitable until the Clinchfield was built; that since then it has earned enough to spend considerable sums in improving its property; that since Federal control, and chiefly since the Clinchfield lease was made, it has spent over $1,600,000 for heavier rail and bridges, and additional equipment; that its revenues are not great now; and that it has no other source to secure the funds needed to better its service and to enable it to compete with stronger lines, such as the Southern. This carrier further claims that it is able to handle much more traffic than it has,

and that it would be seriously injured by the diversion of traffic from the Clinchfield to the P. & N. and the N. & W.

On behalf of the applicant it is asserted that the attitude of the protesting carriers toward the proposed extensions, and the refusal of the Southbound to grant it trackage rights or to sell to it part of its capital stock, show that the proposed construction is necessary to provide added security for its present investment. The applicant's president testified that if the protesting carriers can stop the completion of its line, as projected, there is no reason why they can not strangle its existing lines; that the public is interested in preventing that; and that one of the reasons that prompted the applicant to go ahead with the construction was to create the through route, and to protect its situation against the roads that are opposing it in this case. In view of the divisions received by the applicant from its connections, its rapidly growing revenues, and other facts of record, its fears do not appear well founded. There is no attempt to show that its railroad can not be operated profitably without extension, or that the return on the investment would be insufficient, except in so far as that may be implied from the applicant's fear of strangulation. No evidence was offered to show any past attempt to (7ee) strangle the applicant, and it is plainly evident that if any such attempt had been made it resulted in failure. The applicant's gross revenues were $926,242 for the year ended June 30, 1915, $1,749,046 in 1921, and $2,517,362 in 1926. Its net railway operating revenue for these years was $335,143, $419,715, and $844.575, respectively. Its general balance sheet, as of April 30, 1927, showed total corporate surplus of $3,134,645.53. Under its agreement with the Seaboard the applicant receives 50 per cent of the rate on traffic from Atlanta and points north to points on the P. & N. through Greenwood. The applicant's lines get 40 per cent on all business from the Virginia gateways. This division applies on a 4-mile haul from Pinoca to Charlotte. Business from west of the Virginia gateways is shipped via the Seaboard to the applicant at Charlotte.

Traffic and revenues of the proposed extensions for the first year of operation are estimated by the applicant as follows: 82,320 carloads of freight, mean haul

28.8 miles, earnings per car $43.70, gross freight revenue $3,597,384; passengers 440,785, passenger revenue $196,502; express revenue $70,261; miscellaneous revenue $25,870; total revenue $3,890,017. It is estimtaed that 21 per cent of the freight traffic will have origin and destination on the P. & N.; that 44 per cent will originate on other lines and be destined to stations on the P. & N.; that 20 per cent will originate on the P. & N. and be destined to points beyond the line; and that 15 per cent will originate at and be destined to points beyond the P. & N. The applicant has obtained contracts from a large part of the shippers along its route binding them to give it at least one-half of their traffic. In connection with coal traffic the testimony is that the Southern Power Company expects to build three steam-power plants on the proposed lines, one somewhere along the Yadkin River between Salisbury and Winston-Salem; one between Spartanburg and Gastonia; and one on the lower end of the system. Each of these plants will consume about 3,600 tons of coal a day. The Southern Power Company now has a large steam plant on the Southern near Salisbury, the traffic from which would be diverted to the proposed Winston-Salem extension. The gross revenues of the extensions are estimated to increase 8.4 per cent each year over the preceding year, rising to $5,822,344 for the sixth year.

Net railway operating income of the extensions is estimated at $1,361,506 the first year, increasing to $2,503,608 the sixth year. These estimates equal 35 per cent of gross revenues in the first year and 43 per cent in the sixth. The percentage for the existing lines in 1926 was 33.55.

The estimated cost of construction is $6,684,377 for the Charlotte-Winston-Salem line, and $4,954,088 for the (7ff) Gastonia-Spartanburg line, a total cost, without equipment, of $11,638,465. It is expected that 18 new 60-ton locomotives, costing $75,000 each, will be required for freight service for the first year, and five more locomotives of the same type for the fifth year. The applicant represents that the passenger and freight cars which it now owns are ample to provide for its present needs, but that 10 additional passenger cars and probably 200 freight cars of the present type may be required after five years. The applicant will continue to depend on the

steam roads for freight cars. The figures presented in these estimates show clearly the minor importance of passenger traffic, or of any ordinary interurban movement. The protestants admit that the applicant would probably get at least as much traffic and revenue as it has estimated, and that the proposed investment would be profitable to it because of its connection with the Duke interests.

Maximum grades of the proposed line would be 1 per cent, compensated for curvature. Grading would be heavy for both lines. Track would be laid with 100-pound rail. The applicant wishes to proceed with the work as soon as possible, and estimates that it can be completed in 18 months.

The ability of the applicant to finance the work is not questioned. It has about $1,500,000 available in its treasury, and wishes to issue about $10,000,000 of bonds under its mortgage, preferred stock or debentures for $4,000,000 to $4,500,000, about $1,000,000 of equipment-trust bonds, and common stock for any additional funds needed. That is a total of about $15,000,000 or $15,500,000 in securities, without counting the common stock or the treasury funds. This is about 16 to 20 per cent more than the total estimated cost.

It is contended by the protestants that the proposed lines would not only be almost wholly competitive, but that the applicant's competition is of an unequal or unfair nature, because of the applicant's relation to the various Duke interests and the power of those interests to control and influence traffic in its favor. They assert that because of these relations, the P. & N., with its proposed extensions, would be in effect, a plant facility for the industries controlled and influenced by the Duke interests, and that its operation would result in a violation of the commodities clause of the Hepburn Act. The applicant contends that the community of interest which exists, or is alleged to exist, between itself and the Duke Power Company and its affiliated companies is neither improper, illegal, nor opposed to the public interest; that stock ownership in industries by the Duke interests is not now used and never has been acquired or used to influence traffic to the applicant; that hauling coal to the plants of the Southern Power Company will be a comparatively small part of its business, and is not il-

legal nor opposed to the public interest; that the pro-
(7gg) posed extensions would be built to serve the public generally, not to serve the Duke or other allied interests; and that the public demand for the extensions is unanimous. It admits that technically the applicant is controlled by the so-called Duke interests, but claims that the true ownership of the stock is vested in a very large number of stockholders.

There are outstanding 85,841 shares of the applicant's capital stock, of which the Duke Power Company owns 10,090 shares and the Duke Farms Company owns 34,309 shares. The remaining 48.28 per cent is owned by 486 stockholders. The Duke Farms Company, a holding company, is controlled through a majority stock ownership by the J. B. Duke estate. The Duke Power Company is controlled by the trustees of the Duke Endowment, a perpetual trust created by J. B. Duke on December 11, 1924. The property originally conveyed to this trust was valued at about $40,000,000. There has since been added $10,000,000 by a specific bequest of Duke's will, and it is expected that about $40,000,000 more will be received from his residuary estate. The trust indenture provides that 20 per cent of the net income of the endowment must be retained and added to the corpus of the trust until the sums so added shall amount to $40,000,000. In the event that Duke's daughter Doris should die without issue there may be another large addition to the trust fund. The trust funds may be invested only in the securities of the Duke Power Company or its subsidiaries or in Government, State, or municipal bonds. The trustees are required, when they have funds to invest, to lend them to these companies or to buy their securities, to the extent that such loans or securities are available on satisfactory terms. They are advised not to change any investment in these companies except in response to the most urgent and extraordinary necessity, and they have no power to do so except by unanimous vote of all the trustees at a meeting called for that purpose. The trustees are a self-perpetuating body of 15 members. The will of Duke disposed of a majority interest in the Duke Farms Company and directed that the company be dissolved and its assets distributed to its stockholders. This stock is a part of his residuary estate. One-third of this residuum, plus a sum sufficient

to yield a net annual income of $100,000, is bequeathed to the Doris Duke Trust, the rest to the Duke Endowment. The Doris Duke Trust and the Duke Endowment will therefore hold 11,436 and 32,963 shares, respectively, of the applicant's capital stock. Because the stock held by the Duke Endowment will be only 38.4 per cent of the stock outstanding, the applicant contends that the so-called Duke interests will not exercise control of the applicant. The income from that part of the residuary estate bequeathed to the Doris Duke Trust may not be (7hh) loaned except to the Duke Power Company, nor invested, except in securities of that company, or of the Quebec Development Company, or the subsidiaries of either, or in Government, State, or municipal bonds. If Doris Duke should die without issue the undistributed part of her share of the residuary estate will go to the Duke Endowment. The will fixes the extreme life of the trust at 21 years after Duke's wife and daughter shall both be dead. The trustees of the two trusts are, and will be, the same. It appears reasonable to conclude that effective control of the applicant will be exercised with a unity of interest.

The Duke Power Company owns the Southern Power Company and three smaller power companies of the same general region, viz, the Great Falls Power Company, the Wateree Power Company, and the Western Carolina Power Company. It also owns more than 98 per cent of the capital stock of the Southern Public Utilities Company. The Southern Power Company, which owns the Catawba Power Company, in connection with its affiliated companies, supplies electric energy to some 300 cotton mills in the Carolinas, including most of those in the Piedmont section. It also supplies electricity to the applicant, to the utility companies controlled by the Southern Public Utilities Company, and to other industries. Its lines cover the region along the applicant's railroad and its proposed and projected extensions. From Greenville, Anderson, and Greenwood to the Yadkin River they cover generally a width of from 50 to 75 miles; thence to Durham they are less extended laterally. It owns 10 water-power plants, and steam plants at Greenville, Duncan, Mount Holly, Spencer, Greensboro, and Eno (near Durham). Its present capacity is about 850,000 horsepower.

The Southern Public Utilities Company is a retail power, gas, street railway, and, in a few cases, water-supply company, that operates in the Carolinas. It owns the local public utilities at Winston-Salem, Reidsville, Burlington, Greensboro, High Point, Salisbury, Hendersonville, Hickory, Charlotte, and Bessemer City, N. C.; and at Anderson, Greenville, Greer, Chester, Fort Lawn, and Spartanburg, S. C.

It is shown that the combined Duke interests own 52,411 shares of stock in 13 textile-manufacturing companies, plus $51,400 of stock in four others. All of these mills appear to be along the lines of the Duke power companies, but most of the mills and most of the investment are not along the applicant's present lines. The Republic Cotton Mills were bought to acquire their water rights. Testimony for the applicant is that the other textile-mill stocks were bought to aid the development of industry in the region. The Duke interests own, in addition, $2,662,500, par value, of stock, valued at $9,981,475, (7ii) in the R. J. Reynolds Tobacco Company, which is engaged in manufacturing tobacco at Winston-Salem, and 172,311 shares in six other tobacco companies, valued at $7,917,610. They own 102,000 shares of the 6 per cent preferred stock of the Aluminum Company of America. They also own 1,000 shares of the Carolina Standard Gas Products Company, two electrochemical companies that appear to be of small importance, and some warehouses at Charlotte that cost $140,000. They have one-half interest in the Mercantile Development Company, which owns a building at Charlotte that serves both for warehouses and for general offices for all the power companies, having been built primarily for the latter purpose. They control several business establishments at Charlotte and a short-line steam railroad at Durham. J. B. Duke and the Duke Power Company, at different times since 1905, have owned and sold stock in 36 other cotton mills along the lines of the Duke power companies, in amounts ranging from 50 to 5,206 shares. The list includes nine companies at Greenville. The applicant claims that these stocks were bought to aid industrial development, and not to control railroad traffic. The Southern contends that traffic can be influenced to the applicant by industries not on its line. The applicant's president testified that the large holdings in Jud-

son Mills were not acquired to influence traffic. The uncontroverted evidence for the protestants is that this mill gives the applicant all of its business which the applicant can handle, although it is also reached by the Southern.

The protestants contend that the contracts under which the Southern Power Company sells "secondary power" give that company such wide discretion as to the amount of current it will supply and the time at which it will be furnished that the power company can coerce users of secondary power to ship over the P. & N. The form of contract used appears to give the power company a broad discretion with respect to furnishing this class of power. There is no testimony that it differs from the general practice of power companies or that it has been used to control traffic. It might well influence shippers decisively without any desire on the part of the power company to use it in that way. The applicant owns warehouses at six of the principal points along its line. A contract for the use of space in one of these warehouses, made April 1, 1926, requires the lessee to ship or cause to be shipped over the P. & N. all freight to or from the premises, provided the lessor provides facilities and rates equal to those of competing carriers. The testimony for the protestants is that the Duke Power Company also controls traffic to the applicant through its ownership of warehouses in which space is leased under similar contracts. The applicant claims that its contract was made on an old form, not the one (7jj) intended for current use; that such contracts were formerly in general use by the railways in this section, and that the clause in question is not now enforced. The witness Green attributes much of the Southern's loss of traffic to the applicant at Charlotte to the use, under such contracts, of centrally located warehouses owned by the power companies.

It is contended by the protestants that the composition of the applicant's board of directors indicates that it has been chosen, not for its fitness to direct the affairs of a railroad, but to control traffic in its favor. There are 25 directors. One is chairman of the Duke Endowment, president of the Southern Power Company, and an executor of J. B. Duke's will. At least 20 are prominently connected with the ownership and manage-

ment of cotton mills in the general territory in question, representing a large number of mills at many points. Nineteen are described as the owners, presidents, or heads of mills, sometimes of several, and most of them are not shown to have any other qualifications. The applicant's president, and its vice president and general manager, are the only two who appear to have had experience in railway management. Some attempt is made to show that the protesting carriers, or some of their subsidiaries, have directors with similar affiliations, but the evidence shows no similar directorate in the case of the steam railways.

In August and September, 1925, 93 shippers of Salisbury signed contracts with J. B. Duke and his associates to give at least one-half of their traffic to a railroad to be built by the Duke interest. Similar agreements have been signed by 260 citizens, merchants, and manufacturers of the towns between Gastonia and Spartanburg. The applicant represents that it secured these contracts because it wished to form some estimate of the traffic it could count upon. In view of the testimony as to the applicant's fixed determination to build the line, this method of making a traffic estimate hardly seems necessary.

Witnesses for the applicant admit the great importance of the Southern to the Piedmont section, and say that if its revenues should be so affected as to impair its service it would be a calamity, but they are sure that the proposed construction could not have that result. There is much testimony for the applicant to the effect that all the railways in the territory would benefit by the increased traffic the new lines would produce. Testimony for the Southern is that the effect of building the P. & N. was to divert about 50 per cent of the traffic at mill points reached by both railroads, and that on the line from Greenville to Greenwood this made it necessary to reduce the service from one through freight and one local freight each way daily to one freight train each way, handling both classes of freight, and that there had been no subsequent growth of traffic that would justify restoring the former service. A witness for the (7kk) Southern testified that that company now handles annually 151,248 carloads of freight, inbound and outbound, at the stations into which the applicant proposes

to build, which yield a revenue of $120.16 a car. This estimate is based upon actual records for two months, which, taken together, are said to be fairly typical. The applicant has estimated that it would get 70,020 carloads of freight, excluding bridge traffic, in the first year of operation. This is somewhat less than one-half of the existing traffic. Some of this it might handle in connection with the Southern, but it would naturally try to haul as much as possible to and from Winston-Salem and Greenwood in connection with the N. & W. and the G. & F. Witnesses for the Southern accept the applicant's estimate of traffic, but state that it is probably too low. Using the approximate figure for bridge traffic testified to for the applicant, viz, 12,000 carloads, and deducting this from the total number of cars estimated by the applicant for the first year, it is estimated by the Southern that the remaining cars, at $120.16 per car, yield it an annual revenue of $8,449,651; and that all this business would be lost to it, in addition to some part of the bridge traffic. Extending this calculation to the traffic the applicant has estimated for succeeding years, it is claimed that the Southern's loss of revenue in the first six years of operation of the extensions would be $63,581,935. The Southern asserts that the sinister feature of the applicant's competition is its control of traffic to and from plants in allied ownership, and it attributes to the powerful Duke interests the fact that the applicant has been able to make contracts in advance to take away one-half of the Southern's business on a line whose service the applicant would merely duplicate. There is some testimony for the Southern concerning the part of its loss that would be sustained through the diversion to the P. & N. of coal traffic now handled by the Southern to the steam plants of the Southern Power Company, and also the coal traffic that would be moved to the three new steam plants to be built upon the P. & N. The Southern claims, and it is not directly controverted, that the three new plants could be reached as well from its own line. The testimony for the applicant is that 10,800 tons of coal a day would be handled to plants of the Southern Power Company over its proposed extensions. If this rate of consumption were maintained for 313 days it would amount to 3,380,400 tons a year. The extensions would also haul coal destined to other plants of the Duke

power companies. A very material part of the applicant's revenue would be derived from that source.

In the application alternate routes were proposed for the Winston-Salem extension, one of which would pass through the city of Concord, and the other would (711) diverge about 8 miles west therefrom. The applicant elected to adopt the latter route. The city of Concord and the county of Cabarrus, while supporting the application generally, contend that the Winston-Salem route through Concord should be adopted, and ask for a finding accordingly. In view of the conclusions reached upon the merits, it is unnecessary to consider further this requested change of route.

The proposed lines would closely parallel existing railways throughout their entire length. They would touch no local point of importance not served by existing lines, and the territory to which they would bring rail transportation closer is very small and of limited possibilities in agriculture. The territory to be traversed has excellent highways. There is bus and truck service on highways that closely parallel the proposed route. The railways have good and prompt service to all points that could be reached by the proposed lines and their connections. Some defects are shown in the less-than-carload service of the Southern in this territory, but they are not inherent in the physical property and should be removed, or at least diminished, by administrative measures which are being taken. The existing lines have a present developed capacity in excess of present traffic requirements, and a much greater potential capacity. The through routes proposed in connection with the applicant's extended line are generally longer than existing routes, so far as the record permits comparison, and are not shown to have substantial advantage in other respects, or any economy in the cost of transportation. They would no doubt tend to strengthen the G. & F., which carrier, however, has obtained permission to extend its line without mentioning these proposed extensions as necessary to its success. They would also tend to diminish the usefulness of the connection which is to be built between the L. & N. and the Clinchfield, and to postpone carrying out the ultimate plan for that connection, which would effect a further reduction of 52 miles in the L. & N.-Clinchfield route. This enterprise

has more value to the system of through transportation than anything that could be accomplished by the proposed extensions. The proposed lines would earn a revenue sufficient to justify their construction, if it were not to be diverted from existing lines, particularly from the Southern, which they would closely parallel. They would owe this revenue in part to the power of the applicant to control traffic of companies owned by the same interests, and in some degree to the power of those interests to influence the routing of traffic other than their own. There would no doubt be some benefit to the region immediately served, notwithstanding some impairment that would be likely to result, temporarily at least, in the service of existing lines. These benefits would be largely (7mm) of a competitive nature, that is at the expense of other localities, and could probably be urged in favor of duplicating most of the railway lines in the United States. Competition reasonably necessary should be provided without extensive duplication. The construction of the applicant's railroad and of its proposed and projected extensions present a rather extraordinary case of paralleling an existing line. The presumption against such paralleling as is now proposed can not be overcome by such evidence as is here presented. The investment proposed would not be justified by the net addition to the railway revenues of the country. The competitive nature of the enterprise is aggravated by the association of the applicant with large interests which have the power to control or influence much traffic on other grounds than transportation service. There would be some advantage, both to the applicant and to the communities served, in joining applicant's two existing lines. Only a small part of the traffic handled on either is or would be destined to points on the other. They are being operated successfully, and the evidence presented does not justify further paralleling the Southern closely for a distance of 53 miles.

Upon the facts presented we find that the present and future public convenience and necessity is not shown to require the construction by the applicant of the lines of railroad described in the application. An order will be entered denying the application.

EASTMAN, *Commissioner*, concurring:

The report in this proceeding to my mind contains an excellent analysis of the facts and exposition of the law, and I find no difficulty in agreeing with the conclusions reached. It seems desirable, however, by way of emphasis to summarize briefly certain essential reasons for denying this certificate, as I see them.

In determining whether the construction of new railroad lines should be authorized, doubts should, I believe, be resolved in favor of the construction, particularly where new territory not already supplied with railroad sevice is being opened up. That this has been our policy in granting certificates of exigency the record of past cases amply demonstates. But desire to avoid any undue restriction of enterprise ought not to lead us to approve new construction which involves needless, costly, and wasteful duplication of existing facilities. That is what the law was intended to prevent.

Experience and observation have shown that a proposed new line of railroad is always desired by the people in the territory affected. If the expression of such desire is in itself a sufficient reason for the granting of a certificate, then the law might as well permit unlimited construction. Plainly there must be other evidence that public convenience and necessity require a new line. (7nn) Here it is not proposed to open up any new territory, but to build a third line of track parallel to and practically within sight of an existing double-track railroad which is admittedly providing good service and is not used to anything like its inherent capacity. The attempted justification for such duplication of facilities rests largely upon a claim of superior "flexibility" in electric operation of the kind proposed. If that be a reason here for adding a third track alongside of an existing double-track line with large reserve capacity, it must also be a reason for third-tracking in a similar way many other double-track lines which operate through manufacturing districts. Carried to a logical conclusion such a policy would result in a heavy increase in the transportation burden upon the people of this country. But this claim of need for more "flexible" operation is not impressive, for reasons sufficiently indicated in the main report. Under present conditions, a third track through this Carolina district, opening up no new ter-

ritory and reaching no new markets, would be sheer economic waste. We would be derelict in our duty if we permitted such waste. One mistake of this kind has recently, in my judgment, been made in Florida and it ought not to be repeated here.

If there were need for strengthening this conclusion, such need would be supplied by the fact that this proposed new railroad is closely affiliated with powerful private industrial interests in the Carolinas. The evils of interrelation between transportation lines and industries which they serve are manifest. Such arrangements breed privilege and preference, and run counter to the spirit and I believe also, in many cases, the letter of the law. There are enough at present without adding to the sum total, and I trust that we shall soon be able to test the legality of existing interrelations of his character.'

McManamy, *Commissioner*, dissenting:

With the conclusions expressed by the majority I am not in accord. To my mind applicant has fully met every requirement of the statute.

The ability of the applicant to finance the work has not been questioned nor has objection been raised to the proposed financial structure. Public interest and the need for the service has been shown by the testimony of the Governor and members of the Railroad Commission of South Carolina, the Governor and members of the Corporation Commission of North Carolina, the county and municipal officers of every county and municipality that will be reached by the proposed line, and by some not reached by the proposed line who desire changes in its location or extensions in order that they also may be (700) served by it. Civic and commercial organizations, manufacturers, merchants, and farmers along the proposed route, with exceptional unanimity, appeared and testified as to the need for and the benefits which would flow from the additional service. Surely no more convincing showing of public interest could be made.

Against this, as stated in the report of the majority, "no opposition is voiced except by the carriers now serving the territory." These carriers admit that the new line would get at least as much traffic and revenue as it

has estimated and it is not shown that the ability of the carriers now serving the territory to render service would be thereby impaired. It is admitted that "there would no doubt be some benefit to the region immediately served notwithstanding some impairment that would be likely to result, temporarily at least, in the service of existing lines." The existing lines are not weak railroads. They are among the most prosperous of the country. Their earnings are ample. They are approaching, if not already in, the recapture class. Under such conditions benefit to the region immediately served should not be denied because of the probability that some temporary impairment might result to existing lines when as a matter of fact the showing is that diversion of all the traffic which protestants claim would be diverted would not seriously affect their revenues.

It is true that the proposed line will parallel existing steam lines at distances varying from 0 to 13 miles, but this is also true of practically every other electric line. It is also true that it will not immediatey be self-supporting from new business which it will create, although the showing is that a substantial portion of its revenues will come from such sources. The record shows that the proposed line will, because of more frequent service and stops, render a service more nearly approaching that of motor trucks, which is admittedly desirable in an industrial district such as this. On the showing here made the certificate should be granted.

I am authorized to say that COMMISSIONER ESCH joins in this dissent.

BRAINERD, *Commissioner*, dissenting:

The record shows that the applicant is an electric railway other than street or suburban, that it is engaged in the general transportation of freight, and that it is not operated as a part of a general steam-railroad system of transportation. Although it is true that this carrier, thus engaged and operated, is subject to our jurisdiction under section 15 (4) of the act because "engaged in the general transportation of freight," it is, nevertheless, an interurban electric railway and, not being operated as a part of a general steam-railroad system of (7pp) transportation, it is in express terms excluded

from the commission's jurisdiction to issue or refuse a certificate of public convenience and necessity. Interurban electric railways are brought under the provisions of the act concerning the issuance of certificates of public convenience and necessity only when they are operated as a part of a general steam-railroad system of transportation. Paragraph (22) of section 1 reads as follows:

(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

The act does not distinguish between a "commercial railroad operated by electricity" and an interurban electric railroad not operated as a part of a general steam-railroad system of transportation, and we can make no such distinction.

The motion to dismiss the application for lack of jurisdiction over the subject matter should have been granted.

COMMISSIONER AITCHISON, necessarily absent, did not participate in the disposition of this case. COMMISSIONER WOODLOCK was necessarily absent, but had he been present he would have concurred in the result.

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ORDER.

*Entered April 3, 1928*

A hearing and investigation of the matters and things involved in this proceeding having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclu-

sions thereon, which said report is hereby referred to and made a part hereof:

*It is ordered*, That the application herein be, and it is hereby, denied.

By the commission.

GEORGE B. MCGINTY,
(Seal) *Secretary.*

A true copy.

GEORGE B. McGINTY; Secretary.

(8) **MOTION TO STRIKE OUT PARAGRAPH V OF THE BILL OF COMPLAINT AS IMPERTINENT.**

(Filed April 30, 1930.)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.
AT SPARTANBURG.

| | |
|---|---|
| Interstate Commerce Commission, Plaintiff, *versus* Piedmont and Northern Railway Company, Defendant. | Eq/253. In Equity No. 253. |

NOW COMES the defendant, Piedmont and Northern Railway Company, and moves to strike out Paragraph V of the bill of complaint herein, upon the ground that the allegations of said paragraph are impertinent.

(Signed) H. J. HAYNSWORTH,
(Signed) W. S. O'B. ROBINSON, JR.,
Solicitors for Defendant.

(9) **ANSWER OF THE DEFENDANT.**

(Filed Apr. 30, 1930.)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLLINA, AT SPARTANBURG.

Interstate Commerce Commission, Plaintiff,
*versus*
Piedmont and Northern Railway Company, Defendant.
} In Equity No. 253.

The defendant, Piedmont and Northern Railway Company, without waiving its motion that specified parts of the bill of complaint be stricken out as impertinent, for answer to the bill of complaint of the plaintiff, says and alleges:

I.

Defendant admits the allegations contained in Paragraph I of the Complaint; but denies that said suit can be lawfully maintained by the plaintiff under the provisions of the Acts of Congress cited and referred to in said paragraph of the complaint.

II.

Defendant admits the allegations contained in Paragraph II of the complaint; except defendant denies that it is now, or has ever been, a common carrier by steam railroad. Defendant alleges that it is now, and at all times since its organization has been, and intends to continue, as, a common carrier by interurban electric railway; that at all such times it has been still is, and intends to continue to be, operated as an interurban electric railway, and not as a part or parts of a general steam railroad system of transportation.

III.

Defendant admits the allegations contained in Para-

graph III of the complaint; except that the defendant denies that it now is, or ever has been, subject to those provisions of the Interstate Commerce Act from which there are exempted interurban electric railways not operated as a part or parts of a general steam railroad system of transportation.

IV.

Defendant denies the allegations contained in Paragraph IV of the complaint.

(10) V.

Answering Paragraph V of the complaint defendant admits that on March 26, 1927, it filed with the Commission an application under Paragraph (18) of Section I of the Interstate Commerce Act for a certificate, if deemed to be necessary, that public convenience and necessity required, and would require, the construction and operation by defendant of the two lines of railway referred to and described in said paragraph of the complaint. Said application was filed by the defendant at the direction of the Commission, and without prejudice to defendant's right to assert, and defendant did assert, upon the grounds and for the reasons alleged in said application, that the authority of the Commission conferred by Paragraphs (18) to (21), both inclusive, of Section I of the Interstate Commerce Act, did not extend to defendant, and that the Commission had no jurisdiction or authority over said lines of railway which defendant then proposed to construct and operate. Defendant further admits that interventions were filed by certain common carriers by railroad, and other interested parties, both in support of said application and in opposition thereto; that after a full hearing the Commission on April 3, 1928, made and entered its report and order, a true copy of which said report and order is attached to the bill of complaint marked Exhibit "A"; that the Commission has not in any way modified or altered its finding and action taken in the proceeding upon said application, nor has it issued its certificate for the construction of said lines of railway by defendant, or for any portion thereof, or for the construction by defend-

ant of any line of railroad. Defendant, however, denies that its right to construct and operate the line of railway from Spartanburg, South Carolina, to Gastonia, North Carolina, hereinafter referred to, which defendant proposed to construct and operate, and upon the construction of which it was engaged at the time of the institution of this suit, is concluded, or in any manner affected, by said report and order of the Commission. For the reasons and upon the grounds which will be hereinafter fully alleged, and which were asserted in said application to which the defendant craves leave to refer, defendant denies that the Commission had any jurisdiction of said application, and denies that the Commission has jurisdiction or authority over the construction and operation by defendant of said line of railway between Spartanburg, South Carolina, and Gastonia, North Carolina. Defendant further alleges that as it is advised and believes the allegations contained in Paragraph V of the bill of complaint are irrelevant and impertinent to the issues and questions involved in this suit, and that said allegations should therefore be disregarded and stricken from the bill of complaint.

VI.

Answering the allegations contained in Paragraph VI of the bill of complaint defendant admits that on March 11, 1930, it began work at Spartanburg, South Carolina, and at Gastonia, North Carolina, on the construction of a line of railway between said points with the intention to complete the construction thereof so as to connect the northern terminus of its existing South Carolina mileage with the southern terminus of its existing North Carolina mileage. Defendant admits that at the time of the institution of this suit it was, and since March 11, 1930, has been, engaged on the construction of (11) said line of railway with the intention, unless restrained, to complete the construction thereof, and to engage in transportation under the Interstate Commerce Act over and by means of said line of railway. Defendant admits that it has obtained from the Commission no certificate of public convenience and necessity under Section 1, Paragraphs (18), (19) and (20) of the Interstate Commerce Act to construct and operate said line

of railway; it denies that it is or may be required to obtain such certificate; and it denies that said line of railway was, or is being, constructed by it as an extension of its line or lines of railway undertaken on March 10, 1930, as alleged in Paragraph VI of the bill of complaint. Defendant alleges that said line of railway was, and is being, constructed by it as an essential part of an entire project or undertaking which was undertaken prior to the effective date of Section I, Paragraph (18), of the Interstate Commerce Act, as will be hereinafter more fully alleged.

VII.

Answering the allegations of Paragraph VII of the bill of complaint, defendant denies that its acts hereinbefore admitted and alleged were or are contrary to the provisions of the Act of Congress cited and referred to in said paragraph of the bill of complaint, and denies that its said acts are subject to be enjoined by this court at the suit of the plaintiff, as alleged in said paragraph of the bill of complaint. Defendant admits that unless restrained by this court it intends to continue, and will continue, the construction of the line of railway described in the preceding paragraph hereof, and that it will, when said line of railway is completed, operate, and continue to operate, the same in interstate commerce; but it denies that such operation will be in violation of the provisions of the Interstate Commerce Act.

VIII.

For a first further answer and defense to plaintiff's bill of complaint, and especially to Paragraphs IV, V, VI and VII thereof, defendant alleges:

Prior to the effective date of Paragraph (18) of Section I of the Interstate Commerce Act, as amended by Transportation Act, 1920, J. B. Duke, W. S. Lee and their associates, undertook that certain project to construct, acquire, equip and operate through the Piedmont section of North and South Carolina an electric railway, which they intended to design, construct, equip and operate as an interurban electric railway; that included

and embraced within said project, as essential parts thereof, were the existing lines of the defendant, which are described in Paragraph III of the bill of complaint, and the line now under construction which would connect and join together said existing lines.

In pursuance of said project, the undertakers thereof, on January 6, 1910, caused the Piedmont Traction Company to be organized and incorporated, as a street railway corporation, under the general laws of the State of North Carolina, with power and authority to construct, equip and operate by electricity or other motive power street railways for the transportation of passengers, mail, express, merchandise or other freight. The Piedmont Traction Company acquired the stock of the (12) Charlotte Electric Railway Company, which owned and operated the street railway system in Charlotte, North Carolina; it constructed the street railway system in Gastonia, North Carolina, and the existing line of railway of the defendant company from Gastonia to Charlotte, and operated these last named properties until they were transferred to the defendant, as hereinafter alleged.

In further pursuance of said project, the undertakers thereof, on March 10, 1910, caused the Greenville, Spartanburg & Anderson Railway Company to be organized and incorporated as a street railway corporation under the general laws of the State of South Carolina, with power and authority to construct and otherwise acquire, and to equip and operate by electricity or other motive power, except steam, street railway lines for the transportation of passengers, mail, express, merchandise or other freight; to connect with any other street railway or railway on its proposed line; to purchase or acquire the lines, properties or franchises in or out of the State of South Carolina of any other corporation transacting any business that said Greenville, Spartanburg & Anderson Railway Company was empowered to transact, whether such other corporation was organized under the laws of South Carolina, or any other state; to subscribe for or otherwise acquire, and to hold and enjoy the stocks or bonds of other corporations, whether organized under the laws of South Carolina or any other state; to acquire

by purchase or otherwise, and to carry on and exercise the rights, privileges and franchises and railway property of the Anderson Traction Company, and of any other corporation or corporations engaged in a business similar to that authorized to be conducted by said Greenville, Spartanburg & Anderson Railway Company.

The Greenville, Spartanburg & Anderson Railway Company acquired the street railways in Greenville and Anderson, and acquired from the Anderson Traction Company the electric trolley line of that company between Anderson and Belton, a distance of 10½ miles, which line is the present Belton-Anderson branch of the South Carolina section of defendant's railway. The Greenville, Spartanburg & Anderson Railway Company further constructed defendant's present line from Greenwood to Spartanburg, and operated the same, together with the line between Belton and Anderson, and trackage rights over the street railway lines in Greenville and Anderson, until said properties were transferred to the defendant, as hereinafter alleged.

The line in North Carolina from Gastonia to Charlotte was completed and put in operation in July, 1912; the section of the South Carolina line from Greenwood to Greenville in November, 1913; and the section from Greenville to Spartanburg in April, 1914.

On or about May 20, 1914, the Piedmont Traction Company duly transferred and conveyed all its property, rights, privileges, and franchises, including the aforesaid line from Charlotte to Gastonia, the street railway system in Gastonia, and trackage rights over the street railway system in Charlotte, to the defendant; and on or about June 10, 1914, the Greenville, Spartanburg & Anderson Railway Company likewise duly transferred and conveyed to the defendant all its aforesaid property, rights, privileges and franchises; and at the time of each of said transfers all of the issued and outstanding stock of each of said companies was duly transferred and delivered to the defendant as muniments of title to the properties, rights, privileges and franchises so transferred and conveyed.

Defendant was incorporated by Special Act of the Legislature of South Carolina approved February 24,
(13) 1911, as a means of carrying out said project; the project was announced to the public; the Piedmont Syndicate was formed on January 10, 1911; stock was offered to and subscribed by the public; a mortgage was executed by defendant on July 1, 1914, to The Farmers Loan & Trust Company to secure a bond issue of $50,000,000 to provide capital to carry out said project; and engineering work was done on the line now under construction, all in furtherance of said project and all prior to February 28, 1920.

Said project has never been abandoned, and the defendant entered on, and at the time of the institution of this suit was engaged, on the construction of the line of railway in controversy between Spartanburg, South Carolina, and Gastonia, North Carolina, in pursuance of said project undertaken as aforesaid and with the intention of completing said line and operating the same as a part of said railway as originally planned and designed.

The existing sections of defendant's railway were constructed or acquired with the understanding and upon the condition that they would be connected and joined together by the line now under construction, and unless they are connected and joined together the investment in said lines will be seriously jeopardized, and their future capacity and efficiency to provide transportation facilities and service to the travelling and shipping public will be materially restricted and impaired.

For a second further answer and defense to plaintiff's bill of complaint, and especially to Paragraphs IV, V, VI and VII thereof, defendant alleges:

The existing lines of defendant are now, and at all times since their construction have been, operated exclusively by electricity as a motive power, and as interurban electric railway lines; and, after said lines are connected and joined together by the line now under construction from Spartanburg, South Carolina, to Gastonia, North Carolina, they, as well as said connecting line, will be operated in the same manner and by the same motive power as said existing lines are now operated.

Defendant's lines of railway connect and tie in with the street railway systems of the cities and towns through which said lines extend. Defendant owns and operates the street railway system in Gastonia, North Carolina, and has trackage rights over the street railway systems in Charlotte, North Carolina, and in Greenville and Anderson, South Carolina. The street railway systems in these cities are used by defendant to collect and distribute freight within said cities. Defendant's passenger cars and its freight locomotives are designed to operate, and do operate, around sharp curves as in cities; and outside and between the cities its trains and cars make frequent stops, averaging approximately 1.2 miles apart.

Defendant's passenger cars and freight locomotives are motivated by self-contained motor units, except a few trailers which are attached to cars containing such motor units; the type of construction of the lines is that of a standard interurban electric railway; power is furnished by overhead trolley; a 1500 direct voltage is used between the cities, and a switch arrangement is provided so that in the cities the voltage may be immediately reduced to 750 volts which may be used over the street railway lines; freight traffic is moved by electric locomotives which are designed to serve local conditions, and (14) which would be unsuited for a line with a long haul and heavy load traffic; of defendant's rolling stock only its box cars and automobile cars are suitable for interchange with steam railroad lines.

Defendant provides a switching service over its entire lines; freight trains are operated in small units so as to facilitate switching, and are run more frequently and make more frequent stops than is customary in the case of the ordinary steam railroad; local switches are maintained for industrial plants and cars are set out and picked up all along defendant's lines.

Defendant's railway has been dealt with and regulated by the Interstate Commerce Commission and its several Bureaus, and by other Federal authorities, as an interurban electric railway, not operated as a part or parts of a general steam railroad system of transportation; it has at all times reported its finances and operations to the Commission under the accounting rules governing electric railways instead of those governing

steam railroads; it was taken into Federal Control as an interurban electric railway; on October 12, 1920, the Commission made an informal ruling that defendant was an interurban electric railway not operated as a part of a general steam railroad system of transportation, and therefore not subject to the provisions of the Transportation Act, 1920, relating to the issuance of securities and the approval of same by the Commission; in December, 1920, the U. S. Railroad Labor Board ruled that defendant was an interurban electric railway not operated as a part of a general steam railroad system of transportation, and therefore not subject to the jurisdiction of the Board; and the Bureau of Valuation of the Commission has classified defendant for purposes of valuation as an electric railway instead of a steam railroad.

The line from Spartanburg, South Carolina, to Gastonia, North Carolina, which is now under construction, and which will connect and join together the existing lines, will, upon its completion, be operated in connection with said existing lines and as a part of defendant's railway, and will have the same characteristics and be operated in the same way as the existing lines; and defendant alleges that its railway as now constructed and operated is, and after the line from Spartanburg, South Carolina, to Gastonia, North Carolina, is completed and put in operation, will continue to be an interurban electric railway throughout all its lines and parts; and that said existing lines are not operated, nor will they or said line under construction be operated, as a part or parts of a general steam railroad system of transportation.

WHEREFORE, having fully answered, defendant prays that the bill of complaint be dismissed, and for such other and further order as may be appropriate.

H. J. HAYNSWORTH,
W. S. O. B. ROBINSON, JR.,
Solicitors for Defendant.

4/30/30.

(15) STATE OF NORTH CAROLINA,
County of Mecklenburg.

J. C. McGOWAN, being first duly sworn, deposes and says:

That he is an Officer of the Piedmont and Northern Railway Company, the defendant in the above entitled suit, to-wit, its Secretary; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

J. C. McGOWAN.

Sworn to and subscribed before me this 29th day of April, 1930.

(Seal.)

JAS. S. SEASE,
N. P., Mecklenburg County, N. C.

Com. Exp. 6-18-31.

(16) **AMENDED BILL OF COMPLAINT.**

(Filed May 19, 1930.)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

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|---|---|
| Interstate Commerce Commission, Plaintiff, *vs.* Piedmont & Northern Railway Company, Defendant. | In Equity No. 253. |

To the Honorable Judges of the District Court of the United States for the Western District of South Carolina:

The Interstate Commerce Commission (hereinafter called the "Commission"), a Commission existing un-

der and by virtue of the Interstate Commerce Act and the acts amendatory thereof and supplementary thereto, files this its amended bill of complaint against defendant, Piedmont & Northern Railway Company, and thereupon complains and says:

1. This suit is brought, and the jurisdiction of this court is invoked, under the provisions of section 1, paragraph (20), of the Interstate Commerce Act (24 Stat. 379, as amended 41 Stat. 478; U. S. C. Title 49, Sec. 1, Par. (20)), and under the provisions of the Judicial Code, Section 24, (U. S. C. Title 28, Sec. 41, Par. (8)).

2. Defendant is, and at all times herein mentioned was, a corporation chartered, organized, and existing un-
(17) der and by virtue of the laws of the State of South Carolina as a common carrier by railroad; and defendant is, and at all times herein mentioned was, a resident and inhabitant of the State of South Carolina, with its principal office in the city of Greenwood, in the Western District of South Carolina.

3. At all times herein mentioned defendant was, and now is, a common carrier by railroad subject to the Interstate Commerce Act, and as such was, and now is, engaged in the interstate transportation of property and passengers for hire over two certain lines of railroad owned, controlled, and operated by it, to-wit: a line of railroad in South Carolina, extending from Greenwood to Spartanburg, a distance of 89.9 miles, with a branch line from Belton to Anderson, in that state, of 11.3 miles; and a line of railroad in the State of North Carolina, extending from Gastonia to Charlotte, a distance of 23.5 miles, with a branch line from Belmont Junction to Belmont, in said state, of 3.2 miles.

4. At all of said times defendant was, and now is, a carrier by railroad within the meaning of that term as used in Section 1, paragraphs (18) and (20) of the Interstate Commerce Act (41 Stat. 477, 478; U. S. C., Title 49, Sec. 1, paragraphs (18) and (20)).

5. On March 26, 1927, defendant applied to the Commission under the provisions of Section 1, paragraphs

(18), (19) and (20) of said Interstate Commerce Act, for a certificate that the public convenience and necessity required, and would require, the construction and operation by it of two extensions of its said lines of railroad, the first connecting Spartanburg, the northern terminus of its South Carolina line, with Gastonia, the southern terminus of its North Carolina line, and the other extending from Charlotte, the northern terminus (18) of its North Carolina line, to Winston-Salem, N. C. Interventions were filed by certain common carriers by railroad and other interested parties, both in support of said application and in opposition thereto. Following full hearing, the Commission on April 3, 1928, made and entered its report and order, finding "that the present and future public convenience and necessity is not shown to require the construction by the applicant of the lines of railroad described in the application" and denying said application. Said Commission's report and order appears in *Proposed Construction of Lines by Piedmont & Northern Railway Company*, 138 I. C. C. 363, and a true copy of said report and order, certified by the Secretary of the Commission, is hereto attached and made a part hereof, marked Exhibit A. The Commission has not in any way modified or altered its finding and action so taken in said proceeding, and has not issued its certificate for the construction of said lines of railroad proposed by defendant, or for any portion thereof, or for the construction by defendant of any line of railroad whatsoever.

6. Plaintiff is informed and believes, and so alleges, that on, to-wit, March 10, 1930, defendant, without having first obtained from the Commission the certificate required in such case by said Section 1, paragraphs (18), (19) and (20) of the Interstate Commerce Act (41 Stat. 477, 478; U. S. C., Title 49, Sec. 1, paragraphs (18), (19) and (20)), undertook said extensions of its said line or lines of railroad, and on, to-wit, March 11, 1930, actually began construction thereof at Spartanburg, S. C., and Gastonia, N. C., all with the intention to complete the construction of additional or extended lines of railroad connecting the said northern terminus of its South Carolina line with the said southern terminus of its North Carolina line and connecting the said northern terminus

(19) of its North Carolina line with Winston-Salem, N. C., and to engage in transportation under the Interstate Commerce Act over or by means of such additional or extended lines of railroad; that defendant has ever since that time been engaged in said undertaking and is now engaged therein.

7. That said acts of defendant, described in the preceding paragraph, were and are contrary to the provisions of said section 1, paragraphs (18), (19) and (20) of the Interstate Commerce Act, and are subject to be enjoined by this court at the suit of this plaintiff under the express provisions of said paragraph (20); that, unless restrained by this court, defendant intends to, and will, continue the construction of said extensions of its line or lines of railroad and, when constructed, will operate, and continue to operate, said extensions of its line or lines of railroad in interstate commerce in violation of said provisions of the Interstate Commerce Act.

PRAYER.

WHEREFORE, since plaintiff is without remedy at law in the premises and is expressly given its remedy in equity under the provisions of said section 1, paragraph (20) of the Interstate Commerce Act, plaintiff prays:

a. That a writ of *subpoena* issue against the defendant requiring it, on or before a date to be specified therein, to appear before this honorable court, and then and there to make answer to this bill of complaint.

b. That the defendant be permanently enjoined from constructing and from continuing to construct, said extensions of its line or lines of railroad above mentioned in paragraph 6 hereof, or any extension or extensions of its line or lines of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and (20) necessity require or will require such construction.

c. That a temporary or interlocutory injunction be issued herein restraining and enjoining defendant from

doing any of the acts mentioned in paragraphs 6 and 7 hereof until the further order of the court.

d. That such other and further relief in the premises be granted as to the court may seem meet and as justice and equity may require.

e. That plaintiff have and recover of defendant its costs of this suit.

This is the first application for an injunction in this case.

INTERSTATE COMMERCE COMMISSION.

By DANIEL W. KNOWLTON (Signed)
NELSON & THOMAS, (Signed)

CITY OF WASHINGTON,
District of Columbia, ss:

BALTHASAR H. MEYER, being duly sworn, deposes and says that he is a member of the Interstate Commerce Commission, the plaintiff in the above-entitled cause, and makes this affidavit on behalf of said Commission; that he has read the foregoing amended bill of complaint and knows the contents thereof, and that the same is true.

BALTHASAR H. MEYER. (Signed)

Subscribed and sworn to before the undersigned, a notary public in and for the District of Columbia, this 14th day of May, 1930.

EUGENIA W. SUTER, (Signed)
(Seal) Notary Public.

(21) **PETITION FOR LEAVE TO INTERVENE AND BILL OF INTERVENTION OF SOUTHERN RAILWAY COMPANY, CHARLESTON AND WESTERN CAROLINA RAILWAY COMPANY, ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, CAROLINA, CLINCHFIELD AND OHIO RAILWAY, CAROLINA, CLINCHFIELD AND OHIO RAILWAY OF SOUTH CAROLINA, AND CLINCHFIELD NORTHERN RAILWAY OF KENTUCKY.**

(Filed May 9, 1930.)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.
GREENVILLE DIVISION.

Interstate Commerce Commission, Plaintiff,
*vs.*
Piedmont and Northern Railway Company, Defendant.
} In Equity No. 253.

To the Honorable Judges of the District Court of the United States for the Western District of South Carolina:

Come now your petitioners, Southern Railway Company, Charleston and Western Carolina Railway Company, Atlantic Coast Line Railroad Company, Louisville and Nashville Railroad Company, Carolina, Clinchfield and Ohio Railway, Carolina, Clinchfield and Ohio Railway of South Carolina, and Clinchfield Northern Railway of Kentucky, and respectfully show that they are all parties in interest in this suit, within the meaning of paragraph (20) of section 1 of the Interstate Commerce Act, as amended by Transportation Act, 1920, Title 49, section 1, paragraph (20), U. S. C., and desire to be permitted to assert their rights by intervention in this cause and to become parties plaintiff herein; and therefore pray that their petition and prayer herein, for leave to intervene as parties plaintiff in this cause, be granted, and that, upon the granting of such leave, this their peti-

tion may stand in this cause as their joint pleading and bill of intervention and complaint; and for their grounds for intervention, and also for their grounds for their (22) prayers for relief and for injunction against defendant, say:

1. That each of your petitioners, hereinafter called intervenors, is a carrier by railroad, engaged in transportation of persons and property in interstate commerce, subject to the provisions of the Interstate Commerce Act, as amended, and were, respectively, incorporated and respectively exist, under and by virtue of the laws of the several states, as follows, to-wit: Southern Railway Company, under the laws of the state of Virginia; Charleston and Western Carolina Railway Company, under the laws of the state of South Carolina; Atlantic Coast Line Railroad Company, under the laws of the state of Virginia; Louisville and Nashville Railroad Company, under the laws of the state of Kentucky; Carolina, Clinchfield and Ohio Railway, under the laws of the state of Virginia; Carolina, Clinchfield and Ohio Railway of South Carolina, under the laws of the state of South Carolina; and Clinchfield Northern Railway of Kentucky, under the laws of the state of Kentucky.

2. These intervenors' lines of railroad traverse the state of North Carolina and the state of South Carolina, as well as other states, and serve as interstate carriers the territories served or proposed to be served by defendant, Piedmont and Northern Railway Company, and/or form a through route or routes, or a link or links in a through route or routes, which serve said territory.

3. Defendant is, and at all times herein mentioned was, a corporation, chartered, organized and existing under and by virtue of the laws of the state of South Carolina, as a common carrier by railroad.

4. At all times herein mentioned defendant was, (23) and now is, a carrier by railroad subject to the Interstate Commerce Act, and as such was, and now, is doing an interstate business over two certain lines of railroad owned, controlled and operated by it, to-wit: a line of railroad in South Carolina, extending from

Greenwood to Spartanburg, a distance of 89.9 miles, with a branch line from Belton to Anderson, in that state, of 11.3 miles; and a line of railroad in the state of North Carolina, extending from Gastonia to Charlotte, a distance of 23.5 miles, with a branch line to Belmont, North Carolina, of 3.2 miles.

5. At all of said times defendant was, and now is, a carrier by railroad within the meaning of the terms and provisions of section 1, paragraphs (18), (19) and (20) of the Interstate Commerce Act, as amended by Transportation Act, 1920, Title 49, section 1, paragraphs (18), (19) and (20), U. S. C.

6. On March 26th, 1927, defendant applied to the Interstate Commerce Commission, under the provisions of the Interstate Commerce Act, as amended by Transportation Act, 1920, section 1, paragraphs (18), (19) and (20), Title 49, section 1, paragraphs (18), (19) and (20), U. S. C., for a certifictae of public convenience and necessity for the construction and operation by it of an extension of each of its said lines of railroad hereinbefore described, to-wit: an extension of its said line in South Carolina from its northern terminus, at Spartanburg, across the state line to Gastonia, North Carolina, there to connect with its said line in North Carolina; and an extension of its said North Carolina line from its northern terminus at Charlotte to Winston-Salem, North Carolina; defendant thus seeking certificate of public convenience and necessity authorizing it to construct and put into operation extensions which would practically double its present main line mileage and would make (24) it physically a continuous interstate line of railroad extending from Greenwood, South Carolina, to Winston-Salem, North Carolina, a total main line distance of approximately 254.79 miles, instead of its present main line mileage of 131.59 miles.

7. These intervenors were allowed to and did intervene before the Interstate Commerce Commission, in opposition to said application, and there set up and asserted their rights, which would be seriously and irreparably prejudiced and injured by the granting of said certificate and the construction and operation by defend-

ant, pursuant thereto, of said extensions and extended lines, which would parallel and duplicate the lines of these intervenors, and directly divert from them large amounts of traffic and business, to their serious and irreparable injury. There were also interventions by others in support of the application. Upon said applications and said interventions, a formal proceeding was constituted by the Commission, to which proceeding these present intervenors, as well as the present defendant, were parties. After the taking of voluminous evidence and a proposd report by an examiner of the Commission, the proceeding was heard on the entire record, on briefs and full arguments, by the full Commission. On April 3rd, 1928, the Commission handed down and entered its final report and order, in which, after fully reviewing all of the evidence, contentions and arguments, it found that the construction by the Piedmont and Northern of the proposed extensions would effect an unwarranted paralleling and duplication of the lines and facilities of these intervenors; that the lines and facilities of these intervenors were more than adequate to the railroad needs of the territory involved; that the additional revenues to be earned by the proposed extended lines of the Piedmont and Northern would be largely de-
(25) rived from direct diversion of business from these intervenors, and that the investment proposed would not be justified by the net addition to the railroad revenues of the country; that the competitive nature of the enterprise was aggravated by the association of the applicant with large interests which have the power to control or influence much traffic on other grounds than transportation service; and that the present and future public convenience and necessity had not been shown to require the construction by the applicant of the extensions of lines of railroad described in the application. And the said order denied the application for a certificate of public convenience and necessity on the foregoing and other grounds, all as shown by the official record in said proceeding, and by said final report and order of the Commission, reference being hereby made to the certified copy of said report and order, as attached to the bill of complaint of the plaintiff in this cause, for further and more detailed showing as to the nature and character of the present lines and railroad business of the defend-

ant, as to the nature and character of the proposed extended lines of the defendant and of the railroad business to be carried by it over such lines, if extended as proposed, and as to the diversion of traffic and revenues from, and the irreparable injury to be caused to, each and all of these intervenors, if the said extensions should be constructed and operated by defendant.

8. Since the termination of said proceeding, no other or further application has been made by defendant to the Commission for a certificate of public convenience and necessity for the construction and operation of said extension, or extensions, or any part or parts thereof, or of any extensions whatsoever of its present lines of railroad, and no such certificate has been granted (26) it. And as your intervenors are advised and believe, the defendant is wholly without right or power to construct or to operate the said extensions, or any part thereof, or any extension or extensions of its present lines of railroad.

9. In the said proceeding before the Interstate Commerce Commission, although applying for certificate of public convenience and necessity, as hereinbefore alleged, the Piedmont and Northern Railway Company thereupon moved to dismiss its own petition, alleging that the Commission was without jurisdiction to entertain its application, on the following two grounds:

a. "That said applicant and the lines which it proposes to construct or complete are interurban electric railway, within the meaning of paragraph (22) of section 1, and are not and will not be operated as a part or parts of a general steam railroad system of transportation;

b. "That since the lines now to be completed, as set forth in said application, were *partically* completed and were under construction prior to the effective date of paragraph (18) of section 1, and are parts of a project that is incomplete without them, such lines are not 'extensions', or the 'construction of a new line of railroad', within the meaning of said paragraph."

In the said proceeding, and in its said final report and order, the Commission, after a full review and consideration of all of the evidence, overruled both of these grounds of objection to its jurisdiction, and held that the defendant was not an interurban electric railway, within the meaning of the exception contained in paragraph (22), and that the proposed extension constructions had not been undertaken prior to the effective date of Transportation Act, 1920.

10. Thereafter, and, to-wit, on the 22nd day of May, 1928, the defendant herein, as plaintiff or petitioner therein, filed its petition in the United States District Court for the Western District of South Carolina, this honorable court, against the United States of America, (27) under the act of Congress entitled "An Act Making Appropriations for the Fiscal Year One Thousand Nine Hundred and Thirteen, and for Other Purposes", approved October 22nd, 1913, 38 Stat. at Large, 218, ch. 32, and under Title 28, section 41, sub-division 28, U. S. C., praying this honorable court to set aside and annul the said order of the Commission, and to decree that the Commission was without jurisdiction of the application of Piedmont and Northern Railway Company for certificate, and that the said order of the Commission be set aside and annulled, and that the Commission be forever enjoined from taking any action or proceeding against it under said order. In the said suit in this court, and in its said petition, Piedmont and Northern Railway Company there predicated its prayer for relief on the same two grounds, to-wit: it asserted that the Commission was without jurisdiction to entertain and pass upon its said application for certificate, for that it asserted:

a. That it was an interurban electric railway which was not operated as a part or parts of a general steam railroad system or transportation;

b. That the construction of its proposed extensions was construction which was undertaken by it and which was in part completed and put in operation prior to the effective date of Transportation Act, 1920.

11. The Interstate Commerce Commission and these intervenors intervened in that suit, as defendants, in opposition to the petition of the Piedmont and Northern Railway Company. The said suit was heard before a specially constituted three-judge court, under the Urgent Deficiencies Act, two circuit judges and one district judge sitting, the said hearing being upon the pleadings and upon the entire record made in the proceeding before the Interstate Commerce Commission, and upon such other evidence as the petitioner in that suit offered. The said court of three judges, on January 15th, 1929, (28) handed down its opinion, in which it reviewed all of the evidence and contentions of the parties, and overruled both of the grounds of objection to the jurisdiction of the Interstate Commerce Commission upon which the petition of the plaintiff in that suit was predicated, holding that the Piedmont & Northern Railway Company was not an interurban electric railway, within the meaning of the exception contained in paragraph (22) of section 1, and holding that the construction of the proposed extensions by the petitioner of its lines had not been undertaken, within the meaning of paragraph (18) of section 1, before the effective date of Transportation Act, 1920. And on February 6th, 1929, the said court of three judges entered its final decree, denying the relief prayed by the petitioner, and dismissing said petition.

12. Piedmont and Northern Railway Company perfected an appeal from the said final decree direct to the Supreme Court of the United States, in its assignments of error again asserting the same two objections to the jurisdiction of the Interstate Commerce Commission, but in its brief in the Supreme Court, it abandoned the contention, and the assignment of error raising that contention, that the construction of said proposed extensions had been undertaken by it prior to the effective date of Transportation Act, 1920, and the appeal was argued in the Supreme Court on January 22nd, 1930, and was decided by that court on February 24th, 1930. The Supreme Court, in its opinion and decision, refused to pass upon the merits of the question as to whether the appellant is an interurban electric railway which is not operated as a part or parts of a general steam railroad system of transportaion, within the meaning of para-

graph (22) of section 1 of the Transportation Act, 1920, because it held that the said Urgent Deficiencies Act did (29) not authorize the bringing of a suit to annul, set aside and enjoin a purely negative order of the Commission, that the order of the Commission denying Piedmont and Northern Railway Company's application for certificate of public convenience and necessity was a negative order, and that therefore the District Court was without jurisdiction to entertain the said petition and suit, and the said decree of the District Court of three judges was reversed, with the direction to dismiss the bill and petition for want of jurisdiction, instead of on the merits.

13. Thereafter, and, to-wit, on the 10th day of March, 1930, in the face of and in spite of the denial by the Commission of such certificate, and without having first obtained from the Commission a certificate that the present or future public convenience and necessity require, or will require, the construction, or operation, or construction and operation, of such additional or extended lines of railroad, the defendant, in violation of the provisions of paragraphs (18), (19) and (20) of section 1 of the Interstate Commerce Act, as amended by Transportation Act, 1920, Title 49, section 1, paragraphs (18), (19) and (20), U. S. C., undertook the extension of its said line or lines of railroad, and on the next day, the 11th day of March, 1930, actually began the construction of a new or extended line or lines of railroad, all with the intention to construct and complete said extensions for which certificate of the Commission had been previously sought and denied, and to engage in interstate commerce over and by means of such additional or extended line of railroad. And the defendant, since it so undertook and began such construction, has continued it, and has publicly announced, through its responsible officers, that only an injunction will prevent it from completing said extensions from Spartanburg to Charlotte (30) and from Charlotte to *to* Winston-Salem.

14. In its answer in this cause, the defendant makes the same two contentions which had been overruled by the Commission, and which had been overruled by the said Court of three judges, and one of which had been

abandoned by it in its appeal to the United States Supreme Court.

15. These intervenors aver that defendant is not an interurban electric railway within the meaning of the exception contained in said paragraph (22). On the contrary, it is distinctively an interstate freight carrying railroad of national importance, doing a railroad business of such national scope and character that it is without the regulatory competency of an individual state or states, and is within the regulatory power of the Interstate Commerce Commission, under the Interstate Commerce Act, as amended by Transportation Act, 1920, and in particular under the provisions of paragraphs (18), (19), (20) and (21) of section 1 thereof.

16. Although using electric motive power, instead of steam, by reason of the fact that it is owned and controlled by the Duke Power interests, the largest producers of hydro-electric and steam generated power of the territory, the defendant's railroad is a standard, commercial, freight carrying railroad of national importance all but an inconsiderable part of its business being the carriage of freight in interstate commerce, and usually in carloads, interchanged with steam carriers, and moving in interstate commerce to and from all parts of the United States. In addition, defendant's railroad is operated as a part or parts of a general steam railroad system of transportation, and is an integral and important part of the national railroad system of transportation of (31) the United States. It performs all of the functions of an interstate steam railroad equally with, and in substantially the same manner as, these intervenors and the other steam railroads of the territory, the only essential difference between it and the other interstate steam railroads being its motive power. And the defendant, by its charter, is authorized to use steam as its motive power, and to change its motive power in whole or in part to steam, whenever it may see fit.

17. If the railroad lines of defendant should be extended as proposed, and as they will be extended unless such extension construction be enjoined by this court, it would thereupon become a railroad of even more and

greatly enlarged national and interstate character, scope and importance. In such event, its extended line of railroad would connect physically at Greenwood, South Carolina, with the Georgia and Florida Railroad, an interstate steam railroad leading from points in Florida on the south, to Greenwood, South Carolina, on the north, and would connect physically at Winston-Salem, North Carolina, with the Norfolk and Western Railroad, having a southern terminus at Winston-Salem and crossing to the north and east several states with termini at various important gateways in the north and east. And these three carriers, the Georgia and Florida, the Piedmont and Northern, and the Norfolk and Western, would, in such event, form a new through trunk line of joint and connecting railroads, leading from Florida through and across the southeastern states to the northern and eastern termini of the Norfolk and Western Railroad, which new through trunk line would directly parallel and duplicate, and divert enormous amounts of traffic from the existing trunk lines and joint connecting through lines of railroad of the territory, in particular these intervenors. And such new through trunk line of joint connecting carriers would be operated as a gen-
(32) eral steam railroad system of transportation, and the railroad of the defendant would be operated as a part of, and as the interior connecting link in, such general steam railroad system of transportation.

18. As further evidence of the national character and importance of defendant's railroad, and of the fact that it is now, with its present lines of railroad, an integral part of the general steam railroad system of transportation of the United States, and is a railroad of such character as was sought to be placed within the regulatory power of the Interstate Commerce Commission by Transportation Act, 1920, these intervenors show that in I. C. C. Docket No. 12964, "In the Matter of Consolidation of Railway Properties of the United States Into a Limited Number of Systems", under the plan adopted by the Commission, pursuant to Section 5 of the Interstate Commerce Act, as amended by Transportation Act, 1920, adopted and entered December 9th, 1929, the Commission included defendant in and allocated its present lines of railroad to, System No. 7, Wabash-Sea-

board, together with the Norfolk and Western Railroad Company, Seaboard Air Line Railway Company, Durham and Southern Railway Company, another railroad owned by the same Duke interests, and the various other railroads there allocated to the said Wabash-Seaboard System, and these intervenors are informed and believe that the defendant has in no wise protested against or objected to the said plan or to the inclusion and allocation of its present lines or railroad to the said Wabash-Seaboard System, outlined in said plan.

19. The national and non-local character of the present lines and business of the defendant is much greater than in the case of the ordinary steam or electric freight carrying railroad of equal length of line, by rea-
(33) son of the fact that defendant is owned and controlled by the Duke interests above referred to, the Duke Power Company, the Duke Farms Company, the estate of the late James B. Duke, and other allied and affiliated interests, all working in close and intimate harmony and inter-relationship, and which owning interests are themselves large and important shippers and receivers of freight, controlling their own lage traffic in coal and other merchandise, and having the power to influence, and actually influencing, through stock ownership, industrial power contracts, warehouse traffic agreements, exclusive shipping contracts, and in many other ways, through their many ramifications, a very large, constant and important part of the freight commerce of the piedmont sections of North Carolina and South Carolina. And the said Duke interests, owning and controlling defendant, as aforesaid, have by these means in the past influenced, do now influence, and will in the future influence, large volumes of freight commerce to be controlled and delivered to their railroad, the defendant, and to be removed from the competitive reach of these intervenors, who have no power or means of controlling or securing traffic other than ordinary open competition and the railroad service which they perform and offer to perform. If the construction of the said extensions be not prevented by this court's injunction, the said Duke interests, owning and controlling the defendant railroad, will be able to and will, to a greatly increased extent, control large volumes of traffic for the benefit of their

railroad, the defendant, removing the same from the field of free and open competition, thereby greatly enlarging the interstate and national scope and significance of the defendant railroad, and seriously and irreparably injuring these intervenors.

20. And these intervenors further and in particu-
(34) lar show that the said Duke interests are among the largest receivers and consumers of coal in the piedmont of North Carolina and South Carolina; that by stock ownership and inter-relationship, and by the strategic choice of the directors of the defendant railroad from among the owners and operating officials of important textile and other manufacturing interests of the Carolinas, the said Duke interests and the defendant are able to influence and control the routing and carriage of additional large volumes of traffic moving to and from the said industrial; that at present all of this volume of coal traffic from the coal fields of Tennessee, Kentucky, West Virginia and Virginia, moves by the lines of these intervenors, and of railroads other than the defendant; and that one of the principal purposes sought to be achieved by the defendant and by the Duke interests which own and control it, in the construction of the extensions here sought to be enjoined, is the connecting up of defendant's extended and connected line with the line of the Norfolk and Western Railroad, and the controlling and diverting of practically all or a large part of the said great volume of coal traffic from these intervenors and other carriers, so that it will move from the coal fields to the Carolinas by the lines of the Norfolk and Western and the Piedmont and Northern, all to the great increase of the interstate and national business of the defendant, and to the irreparable loss and injury of these intervenors.

15. And to the extent to which defendant, if its lines be extended as proposed, will carry such coal and other commodities shipped to and from and owned by the Duke interests, which also own and control the defendant, such carriage will be in violation of the Commodities Clause of the Hepburn Act, Title 49, section 1, paragraph (8), U. S. C.; and such is the identity and
(35) community of interest between the defendant and

the Duke Power Company and other allied Duke interests which own and control defendant, that the profits to defendant from the carriage of freight for the owning Duke interests will flow directly to the benefit of the shippers and receivers of such freight, the said Duke interests, and will constitute continuous rebates of freight charges to said Duke interests, and continuous discriminations against other shippers who do not own railroads, in violation of section 41 of the Interstate Commerce Act, Title 49, section 41, U. S. C. And the character of the competition which defendant is able to and will be able to exert, and now exerts and will continue to exert, against these intervenors, is greatly aggravated by these circumstances, the ownership and control of defendant by the said powerful shippers of the territory, who positively control, and will continue to control, large amounts of interstate freight traffic delivered to defendant, and removed thereby from the field of free competition between railroads.

22. These intervenors deny that the defendant undertook the construction of the said extensions, or any part thereof, prior to the effective date of Transportation Act, 1920. They aver that the first corporate action ever taken by the defendant determining upon such extension or extensions, or any part thereof, was a resolution adopted by the Directors of the defendant on November 3rd, 1926, calling a meeting of its stockholders for the purpose of securing authority for the Directors to construct the proposed extensions. Prior to that resolution, defendant had never determined upon any extension of its lines, and in particular had never determined upon the particular extensions undertaken by it on March 10th, 1930, as hereinbefore alleged, and defendant had (36) never engaged in any construction work looking to or leading to the said extensions, or any part thereof, until the 11th day of March, 1930, as hereinbefore alleged. The Act of South Carolina incorporating the defendant contains a proviso that unless the defendant shall enter and begin the actual construction of lines in any county in that state into which it is empowered to enter, either expressly or under the general clause of the act, within ten (10) years from March 1st, 1911, all rights and franchises given to enter and construct lines

in such county or counties should expire. The said period of ten (10) years expired with no such actual construction being begun, and thereupon, to-wit, on March 1st, 1921, the defendant lost all charter power to construct any part of said extensions in the State of South Carolina. It never had any charter power to construct any part of said extensions in the State of North Carolina. And it only acquired a new right to engage in any construction of railroad lines in the State of South Carolina, under and by virtue of the terms of a statute of South Carolina adopted January 27th, 1927, years after the effective date of Transportation Act, 1920.

23. By reason of the facts hereinbefore alleged, if defendant constructs said extensions, and unless enjoined by decree of this court from so doing, freight traffic will be directly diverted by defendant from these intervenors, and freight revenues will be taken away from and irrevocably lost by these intervenors, in the amount of millions of dollars annually, all to the irreparable injury to these intervenors, and to the great and irreparable impairment of their ability to perform in the public interest the railroad service which they now perform, and all against the interests of the shipping public, and in direct violation of the provisions of paragraphs (18), (19) and (20) of section 1 of the Interstate
(37) Commerce Act as amended by Transportation Act, 1920, Title 49, section 1, paragraphs (18), (19) and (20), U. S. C.

24. This application for intervention is made with the consent of the original plaintiff in this cause, the Interstate Commerce Commission.

WHEREFORE, these intervenors pray:

1. That upon their foregoing showing that each of them is a party in interest to this suit, the court grant leave to these intervenors to intervene as parties plaintiff in this cause, and enter preliminary order to that effect.

2. That upon the granting of said leave to intervene, this petition and bill of intervention be filed and

allowed to stand in this cause as the joint pleading, complaint and bill of intervention of these intervenors, and that defendant be directed and time be allowed it to answer said bill of intervention.

3. That defendant, its officers, directors, agents, employees and attorneys, be finally and permanently enjoined and restrained from constructing and from continuing to construct any extension or extensions of its said lines of railroad, or any part thereof, unless and until there shall first have been obtained from the Interstate Commerce Commission a certificate that the present or future public convenience and necessity require, or will require, the construction, or operation, or construction and operation, of such additional or extended line or lines of railroad.

4. That such other and further relief in the premises be granted as to the court may seem meet and as justice and equity may require.

5. That these intervenors have and recover of de-
(38) fendant their costs in this suit.

This is the first application by these intervenors for an injunction in this cause.

SOUTHERN RAILWAY COMPANY,

By (signed) L. E. JEFFRIES,
(signed) S. R. PRINCE,
(signed) S. S. ALDERMAN,
(signed) L. L. OLIVER,
(signed) P. A. BONHAM,
Solicitors.

CHARLESTON AND WESTERN CAROLINA RAILWAY COMPANY,

By (signed) F. B. GRIER,
(signed) CARL H. DAVIS,
Solicitors.

ATLANTIC COAST LINE RAILROAD COMPANY,

By (signed) F. B. GRIER,
(signed) CARL H. DAVIS,
Solicitors.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,

By (signed) WM. BERGER,
.....
Solicitors.

CAROLINA, CLINCHFIELD AND OHIO RAILWAY; CAROLINA, CLINCHFIELD AND OHIO RAILWAY OF SOUTH CAROLINA; AND CLINCHFIELD NORTHERN RAILWAY OF KENTUCKY,

By (signed) JAS. J. McLAUGHLIN,
Solicitor.

(39) DISTRICT OF COLUMBIA,
City of Washington.

L. E. JEFFRIES, being first duly sworn, deposes and says that he is Vice-President of Southern Railway Company, one of the intervenors herein named; that he is an executive officer thereof, and is duly authorized to execute this verification on behalf of Southern Railway Company and on behalf of all of the other intervenors; that he knows the contents of the foregoing petition for intervention and bill of intervention; that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he verily believes it to be true.

(Signed) L. E. JEFFRIES.

Subscribed and sworn to before me, this 8th day of May, 1930.

(Signed) P. K. HOWARD,
(Seal.) Notary Public.

(40) **ORDER ALLOWING THE FOLLOWING TO INTERVENE AS PARTIES PLAINTIFF IN THIS CAUSE, VIZ: SOUTHERN RAILWAY CO., ATLANTIC COAST LINE RAILROAD CO., CHARLESTON & WESTERN CAROLINA RAILWAY CO., LOUISVILLE & NASHVILLE RAILROAD CO., CAROLINA, CLINCHFIELD & OHIO RWY., CAROLINA, CLINCHFIELD & OHIO RWY. OF S. C., CLINCHFIELD NORTHERN RWY. OF KENTUCKY.**

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.
GREENVILLE DIVISION.

Interstate Commerce Commission, Plaintiff,
*vs.*
Piedmont and Northern Railway Company, Defendant.
} In Equity No. 253.

This cause came on to be heard, after due notice to the plaintiff and to the defendant, before the undersigned United States District Judge at Greenville, S. C., on the 19th day of May, 1930, upon the petition of Southern Railway Company, Atlantic Coast Line Railroad Company, Charleston and Western Carolina Railway Company, Louisville and Nashville Railroad Company, Carolina, Clinchfield and Ohio Railway; Carolina, Clinchfield and Ohio Railway of South Carolina, and Clinchfield Northern Railway of Kentucky, for leave to intervene as parties plaintiff in this cause, and upon consideration of said petition it appearing that each of said petitioners is a party in interest and is entitled to intervene as a party plaintiff herein, and it further appearing that the original plaintiff, Interstate Commerce Commission, consents to their intervention, but that the defendant objects thereto;

It is now, therefore, considered and ordered that the said petitioners be and they are hereby allowed to intervene as parties plaintiff in this cause; that their said petition and bill of intervention stand as their joint bill of intervention and complaint; that the defendant be

and it is hereby granted twenty days from the date of this order in which to answer or otherwise plead to the said bill of intervention if it be advised to plead thereto; and that this order is entered without prejudice to the right of the defendant to make any objection which it may be advised to make to said bill of intervention or any part thereof.

J. LYLES GLENN,
United States District Judge.

May 19th, 1930.

To the making and entering of the foregoing order (41) the defendant, Piedmont and Northern Railway Company, in apt time objected and excepted and its exception is hereby allowed.

This the 19th day of May, 1930.

J. LYLES GLENN,
United States District Judge.

(42) **MOTION OF DEFENDANT TO STRIKE OUT PARAGRAPH V OF THE AMENDED BILL OF COMPLAINT AS IMPERTINENT.**

(Filed May 29, 1930.)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA, AT SPARTANBURG.

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| Interstate Commerce Commission, Plaintiff, *versus* Piedmont and Northern Railway Company, Defendant. | In Equity. No. 253. |

NOW COMES the defendant, Piedmont and Northern Railway Company, and moves to strike out Paragraph V of the amended bill of complaint herein, upon the grounds that the allegations of said paragraph are impertinent; that the proceedings before the Interstate

Commerce Commission and the alleged report and order of the Commission made and entered in said proceedings, as alleged in said paragraph of the bill of complaint, do not adjudicate the defendant's right to construct and operate the line of railway involved in this suit, or the extended or additional lines described and referred to in the amended bill of complaint, and do not adjudicate the defendant's right to do and perform any of the acts described and complained of in the amended bill of complaint; that said alleged order does not enjoin the defendant to do or refrain from doing any of (43) the acts complained of in the plaintiff's amended bill of complaint, is entirely negative, is not susceptible of violation, and does not call for enforcement, nor can it be made a ground for the inmunction or for any other relief sought by the plaintiff and for which it prays in this suit.

H. J. HAYNSWORTH (Signed)
W. S. O'B. ROBINSON, JR., (signed)
Solicitors for Defendant.

May 29/30.

(44) **MOTION OF DEFENDANT TO STRIKE OUT PARTS OF THE BILL OF INTERVENTION AND COMPLAINT OF THE SOUTHERN RAILWAY COMPANY AND OTHER INTERVENING STEAM RAILROADS.**

(Filed May 31, 1930.)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA, AT SPARTANBURG.

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| Interstate Commerce Commission, Plaintiff, *versus* Piedmont and Northern Railway Company, Defendant. | In Equity No. 253. |

NOW COMES the defendant, Piedmont and Northern Railway Company, and moves to strike out the following parts of the bill of intervention and complaint of the Southern Railway Company and other intervening steam railroads, to-wit:

1. Paragraphs 6, 7, 8, 9, 10, 11, 12 and 14, and those parts of Paragraph 13 of said bill of intervention and complaint which read as follows, to-wit: "in the face of and in spite of the denial by the Commission of such certificate", and "for which certificate of the Commission had been previously sought and denied", upon the grounds that the allegations of said paragraphs, and each of said allegations, are impertinent; that the proceedings before the Interstate Commerce Commission, and the alleged report and order of the Commission made and entered in said proceedings, as alleged in said bill of intervention, do not adjudicate the defendant's right to construct and operate the extended or additional line or lines of railway described and referred to in said bill (45) of intervention, and do not adjudicate the defendant's right to do and perform any of the acts described and complained of in said bill; that said alleged order does not enjoin the defendant to do or refrain from doing any of the acts complained of, is entirely negative, is not susceptible of violation, and does not call for enforcement, nor can it be made a ground for the injunction or for any other relief sought by the original plaintiff, or by the intervening plaintiffs; that the United States District Court, for the Western District of South Carolina, had no jurisdiction of the suit which the defendant herein instituted in said court against the United States on May 22, 1928, as alleged in said bill of intervention and complaint; that the appeal of this defendant to the Supreme Court of the United States from the final decree made and entered in said suit involved only questions of law as to the validity and correctness of said final decree, and it appears from said bill of intervention and complaint that the Supreme Court of the United States held and determined that said District Court of three Judges was without jurisdiction to entertain and determine said suit, and reversed the final decree made and entered therein with directions to dismiss the bill filed by this defendant, as plaintiff in said suit, for want of jurisdiction; and upon the further ground that said allegations contain no statement of any ultimate fact upon which the plaintiff or said intervening plaintiffs ask, or can ask, the relief sought in this suit.

2. Paragraph 18 of said bill of intervention and complaint, upon the grounds that the allegations of said paragraph are impertinent; that they contain no statement of any ultimate fact upon which the plaintiff or the (46) intervening plaintiffs ask, or can ask, the relief sought in this suit; and that the matters and things alleged in said paragraph, and each and every part of same, are irrelevant, incompetent and inadmissable as evidence in this suit.

3. Paragraphs 19, 20 and 21 (erroneously numbered 15), upon the grounds that the allegations of said paragraphs, and each and every of said allegations, are impertinent; that they contain no statement of any ultimate fact upon which the plaintiffs or the intervening plaintiffs ask, or can ask, the relief sought in this suit; and that said allegations seek to raise collateral issues and questions of fact and law irrelevant to the issues and questions directly and properly involved in this suit.

H. J. HAYNSWORTH, (Signed)
J. H. MARION, (Signed)
W. S. O'B. ROBINSON, JR., (Signed)
Solicitors for Defendant.

May 30/30.

(47) **SUPPLEMENTAL ANSWER OF THE DEFENDANT TO AMENDED BILL OF COMPLAINT.**

(Filed May 29, 1930.)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA, AT SPARTANBURG.

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| Interstate Commerce Commission, Plaintiff, *versus* Piedmont and Northern Railway Company, Defendant. | In Equity No. 253. |

The defendant, Piedmont and Northern Railway Company, without waiving its motions that specified

parts of the bill of complaint and of the amended bill of complaint be stricken out as impertinent, for answer to the amended bill of complaint filed herein on the 19th day of May, 1930, under leave of this court, files this its supplemental answer in addition to its original answer filed herein on the 30th day of April, 1930, and here and now adopts said original answer, as hereby supplemented and amended, as its answer to said amended bill of complaint, as if said original answer, except as hereinafter supplemented and amended, were herein set out in the same words:

VI.

Answering the allegations contained in Paragraph VI of the amended bill of complaint, defendant says that (48) its Board of Directors at a special meeting duly called and held in Greenville, South Carolina, on March 10, 1930, passed the two resolutions which appear on the minutes of said meeting, a true copy of which said minutes is hereto attached, marked Exhibit "A", and made a part hereof, and a true copy whereof, duly certified, was mailed to the plaintiff on March 11, 1930. It admits that thereafter, to-wit, on March 11, 1930 it began work at Spartanburg, South Carolina, and at Gastonia, North Carolina, on the construction of the line of railway between said points, with the intention to complete the construction thereof so as to connect the northern terminus of its existing South Carolina mileage with the southern terminus of its existing North Carolina mileage; that at the time of the institution of this suit it was, and since March 11, 1930, had been engaged on the construction of said line of railway, with the intention, unless restrained, to complete the construction thereof and to engage in transportaion under the Interstate Commerce Act over and by means of said line of railway; and that it has obtained from the Commission no certificate of public convenience and necessity under Section I, Paragraphs (18), (19) and (20) of the Interstate Commerce Act to construct and operate said line of railway. It denies, for the reasons and upon the grounds alleged in its original answer, that it is or may be required to obtain such certificate. That while the project referred to in said minutes contemplates the con-

struction of a line from Charlotte to Winston-Salem, and also a line to Durham, the defendant is not now, and was not at the time of the institution of this suit, taking any steps or engaged in any act to construct, or with the intention now to construct said last named lines, or either of them, or any other line of railway except the line from Spartanburg to Gastonia; that said line from (49) Spartanburg to Gastonia is essential to that part of said project under which defendant's existing lines were constructed, and the defendant is constructing said line from Spartanburg to Gastonia with the intention, independently of any other part of said project, to connect and join together its existing lines, so that the same will constitute and form, and may be operated as, a connected and continuous line of railway.

VII.

Defendant denies the allegations of Paragraph VII of the amended bill of complaint, and each and every part of same, with this exception: Defendant admits that at the time of the institution of this suit it was engaged on the construction of the line of railway hereinbefore described from Spartanburg, South Carolina, to Gastonia, North Carolina, and that unless restrained by this court it intends to continue, and will continue, the construction of said line of railway, and that upon the completion thereof it will operate, and continue to operate, the same in interstate commerce; but it specifically denies that its construction of said line of railway from Spartanburg, South Carolina, to Gastonia, North Carolina, was or is, or that its operation of same will be, contrary to or in violation of any provision of the Interstate Commerce Act; and specifically denies that its acts in constructing said line of railway with the intention to operate the same as hereinbefore alleged, and as alleged in its original answer, are subject to be enjoined by this court at the suit of the plaintiff under any provision of the Interstate Commerce Act, or under any other ground.

WHEREFORE, having fully answered, defendant renews the prayer of its original answer, and prays that (50) the amended bill of complaint be dismissed, and

for such other and further order as may be appropriate.

(Signed) H. J. HAYNSWORTH,
W. S. O'B. ROBINSON, JR.,
Solicitors for Defendant.

May 29/30.

**EXHIBIT "A".**

*Certified Copy of Resolutions Adopted at Special Meeting of Board of Directors of Piedmont and Northern Railway Company, Held at Greenville, South Carolina, on March 10, 1930.*

Mr. W. S. Lee, the President of the Company, stated that the meeting had been called for the purpose of discussing with the Directors the opinion the United States Supreme Court delivered February 24, 1930, in the case of Piedmont and Northern Railway Company *vs.* United States, Interstate Commerce Commission, Southern Railway Company, and others involving the Company's right to complete its lines, and of advising with the Directors about the steps to be taken in view of the decision and opinion of the court. He laid before the Board a copy of the opinion, and stated that he was advised by counsel of the company that the decision of the court does not determine the Company's right to proceed with the completion of its lines, but leaves this question for future determination in the event the right to complete the lines should be further denied and contested. He called attention to the statement in the opinion that the right of the Company to proceed with the proposed construction is not affected or controlled by the ruling of the Interstate Commerce Commission in its report of April 3, 1928, and read to the Board the following language from the opinion:

"Neither the assumption of the jurisdiction by the commission nor its denial of the application can operate as *res judicata* of the railway's claim of immunity. If, as is contended, the commission was without jurisdiction, the railway is as free to proceed with the construction as if the application had not been made and the commission had not acted. Nothing done by the com-

mission can prejudice the railway's claim to immunity in any other proceeding."

(52) The matter was thereupon thoroughly discussed in detail by all of the Directors present.

Upon motion of Capt. E. A. Smyth, duly seconded by Mr. A. F. McKissick, the following resolution was unanimously adopted:

"BE IT RESOLVED, That the completion of the lines of the company as the same were originally projected and planned to extend through the Piedmont section of North and South Carolina from Greenwood and Anderson on the South, to Durham and Winston-Salem on the North, not be abandoned, and said original plan and project is hereby reaffirmed and approved."

Upon motion of Mr. J. P. Gossett, duly seconded by Mr. J. H. Separk, the following resolution was unanimously adopted:

"BE IT RESOLVED, That the officers of the company be, and they hereby are, directed and instructed to proceed toward the completion of the lines of the company as originally planned and projected, by forthwith commencing construction upon and prosecuting to completion, with due diligence and dispatch the line from Spartanburg, South Carolina, to Gastonia, North Carolina, which will connect and join together the existing lines of the company."

I, J. C. McGowan, Secretary of Piedmont and Northern Railway Company, hereby certify that the foregoing is a true and correct transcript from the minutes of special meeting of Board of Directors of Piedmont and Northern Railway Company, held at Greenville, South Carolina, on March 10, 1930, and that said meeting was duly called and held in all respects in accordance with the laws of the State of South Carolina and by-laws of the Company, and that a quorum was present.

In Witness Whereof, I have hereunto set my hand (53) and affixed the seal of said corporation, this day of March, A. D., 1930.

(Signed) J. C. McGOWAN, Secretary.

STATE OF NORTH CAROLINA,
(54) County of Mecklenburg.

J. C. McGowan, being first duly sworn, deposes and says:

That he is an Officer of the Piedmont and Northern Railway Company, the defendant in the above entitled suit, to-wit, its Secretary; that he has read the foregoing Supplemental Answer and knows the contents thereof, and that the same is true of his own knowledge except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

(Signed) J. C. McGOWAN.

Sworn to and subscribed before me, this the 28th day of May, 1930.

(Seal) JAS. S. SEASE (Signed)
Notary Public.
Mecklenburg County, N. C.

My Commission Expires June 18, 1931.

**ANSWER OF DEFENDANT TO THE BILL OF INTERVENTION AND COMPLAINT OF THE SOUTHERN RAILWAY COMPANY AND OTHER INTERVENING STEAM RAILROADS.**

(55) (Filed June 9, 1930.)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA, AT SPARTANBURG.

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| Interstate Commerce Commission, Plaintiff, *versus* Piedmont and Northern Railway Company, Defendant. | In Equity No. 253. |

The defendant, Piedmont and Northern Railway Company, without waiving its motion that specified parts

of the bill of intervention and complaint of the Southern Railway Company, and other intervening steam railroads, be stricken out, for answer to said bill of intervention and complaint, says and alleges:

I.

Defendant admits the allegations of Paragraph I.

II.

Defendant admits that the lines of railroad of the Southern Railway Company, and of the Atlantic Coast Line Railroad Company, traverse the States of North and South Carolina; that the lines of the Southern Railway Company and of the Charleston & Western Carolina Railway Company, serve the territory served and proposed to be served by the defendant, or (56) parts of said territory, and that the intervenors are parties to or links in through routes which serve said territory. Except as herein specifically admitted the allegations of Paragraph II are denied.

III.

Defendant admits the allegations contained in Paragraph III, and alleges that it is now, and at all times since its orgnization, has been, and intends to continue as, a common carrier by interurban electric railway not operated as a part or parts of a general steam railroad system of transportation.

IV.

Defendant admits the allegations contained in Paragraph IV; except that the defendant specifically denies that it now is or has ever been, subject to those provisions of the Interstate Commerce Act from which interurban electric railways not operated as a part or parts of a general steam railroad system of transportation, are exempted.

V.

Defendant denies the allegations contained in Paragraph V.

VI.

Answering Paragraph VI, defendant did on March 26, 1927, file with the Commission an application under the provisions of the Interstate Commerce Act referred to in said paragraph, for a certificate, if deemed to be necessary, that public convenience and necessity required and would require the construction and operation by defendant of the two lines of railway referred to in said paragraph. The defendant filed said application under the direction of the Commission and without prejudice to defendant's right to assert and defendant did assert, upon the grounds and for the reasons alleged in said ap-
(57) plication, that the authority of the Commission conferred by Paragraphs (18) to (21) both inclusive, of Section I of the Interstate Commerce Act, did not extend to the defendant, or to the lines of railway which it then proposed to construct and operate, namely, upon the grounds and for the reasons that the defendant is an interurban electric railway not operated as a part or parts of a general steam railroad system of transportation, and that the defendant proposed to construct and operate said lines as parts of a project duly undertaken prior to the effective date of said provisions of the Interstate Commerce Act. Defendant alleges that the Commission had no jurisdiction or authority to entertain, consider and pass upon said application.

VII.

Answering Paragraph VII, it is admitted that the intervenors were allowed to intervene, and did intervene, before the Interstate Commerce Commission in opposition to said application, upon the grounds appearing in the report of the commission hereinafter referred to; that there were interventions by numerous other parties in support of said application, and that after the proceedings appearing from its report the Commission on April 3, 1928, handed down and entered

its final report and order, a copy of which is attached to the original bill of complaint in this suit, marked Exhibit "A", and made a part thereof. Defendant denies that the Commission had any jurisdiction or authority to make and enter said report and order, and denies that its right to construct and operate the line of railway from Spartanburg, South Carolina, to Gastonia, North Carolina, on the construction of which it was engaged at the time of the institution of this suit, was adjudicated, or is concluded, or in any manner affected, by said report and order of the Commission. Defendant denies (58) the allegations of Paragraph VII, except as herein admitted.

VIII.

Defendant denies the allegations of Paragraph VIII, with this exception: It admits that since the termination of the proceeding referred to in said paragraph it has made no application to the Commission for a certificate of public convenience and necessity for the construction and operation of the line of railway from Spartanburg, South Carolina, to Gastonia, North Carolina, or any other line of railway, and that no such certificate has been granted it.

IX.

Defendant admits the allegations of Paragraph IX in so far as the matters and things therein alleged specifically appear from said report and order of the Commission; otherwise and except as hereinbefore specifically admitted the allegations of said paragraph are denied.

X.

The allegations of Paragraph X are admitted, except that the grounds on which the defendant predicated its prayer for relief in said suit are not fully and correctly set forth, and if it should become material to do so defendant prays leave to refer to the record of said suit.

XI.

Answering Paragraph XI, defendant alleges that upon its appeal to the United States Supreme Court from the final decree made and entered in the suit referred to in said paragraph, the Supreme Court reversed said decree on the ground that the court of three Judges had no jurisdiction of said suit, and directed said court to dismiss the bill of the defendant, as plaintiff in said suit, for want of jurisdiction.

XII.

(59) Answering Paragraph XII, defendant alleges that its appeal to the Supreme Court of the United States from the final decree made and entered in the suit referred to in said paragraph, involved, and could involve, only questions of law as to the validity and correctness of said final decree, and the defendant did concede in the Supreme Court that there was some evidence in the record before the court tending to contradict the defendant's contention that the proposed lines of railway involved in said appeal were parts of a project which had been undertaken prior to the effective date of the Transportation Act of 1920, and that the defendant could not successfully contend that it was established by said record, as a matter of law, that the construction and operation of said lines had been undertaken prior to said effective date. It is admitted that the Supreme Court refused to pass upon the merits of the question attempted to be presented by said appeal, and reversed the decree of the District Court of three Judges, upon the ground that the District Court was without jurisdiction to make and enter said decree, and with directions to the District Court to dismiss the suit in which said decree had been entered for want of jurisdiction.

XIII.

Defendant denies the matters and things alleged in Paragraph XIII, and each and every part of said paragraph, with these exceptions: On March 11, 1930, defendant began work at Spartanburg, South Carolina, and at Gastonia, North Carolina, on the construction of the

line of railway between said points which will connect and join together the existing sections of defendant's railway, with the intention to complete the construction of said line of railway and to engage in transporta-
(60) tion in interstate commerce over and by means of same. It has obtained from the Interstate Commerce Commission no certificate of public convenience and necessity under Section I, Paragraph (18), (19) and (20) of the Interstate Commerce Act, to construct and operate said line of railway, and denies, for the reasons and upon the grounds alleged in its original answer in this suit, that it is or may be required to obtain such certificate.

XIV.

Defendant denies the allegations of Paragraph XIV, and refers to its original answer in this suit for a correct statement of its contents.

XV.

Defendant denies the allegations of Paragraph XV, with these exceptions: It is an interurban electric railway engaged in the general transportation of freight in interstate commerce, and as such is within the scope and meaning of those provisions of the Interstate Commerce Act, as amended by Transportation Act, 1920, which deal with interurban electric railways engaged in the general transportation of freight, but it is not operated as a part or parts of a general steam railroad system of transportation, and therefore is not subject to the provisions of Paragraphs (18) to (21), inclusive, of Section I of said Act.

XVI.

Defendant denies the matters and things alleged in Paragraph XVI, and each and every part of said paragraph, with these exceptions: Its railway is now, and has at all times been, operated exclusively by electricity as a motive power; at present, and for several years past, the major part of its operating revenues are and have been derived from freight traffic, most of which

is handled by defendant for movement in interstate com-
(61) merce and is interchanged with steam railroads and a large part of which is handled in carload lots. At one time, and for several years, defendant derived large operating revenues from the passenger traffic handled by it, and still meets every demand made upon it for passenger service, and does all the passenger business available to it, but in recent years, due to causes beyond its control, its revenues from passenger traffic have steadily decreased, while at the same time those from freight traffic have increased, due to the increased demands made upon defendant for freight service of the charac ter performed by it. It admits that it performs the functions of an interstate steam railroad in the sense that it transports freight and passengers, but it denies that it does so substantially in the same manner as the intervenors and other steam railroads, and that the only essential difference between it and steam railroads is its use of electricity as a motive power. It transports and handles freight and passengers, and in every respect conducts its business as an interurban electric railway, and in accordance with the usual practices and operating methods of interurban electric railways engaged in the general transportation of freight. By its charter it was authorized to construct, maintain and operate its railway by electricity or other motive power. It constructed and equipped its railway as an interurban electric railway, and for operation exclusively by electricity, and has ever since maintained and operated it as such, and has no intention of changing the construction and equipment of its railway, or of ever operating it by any motive power except electricity.

XVII.

Defendant denies the matter and things alleged in Paragraph XVII, and each and every part of said para-
(62) graph, with this exception: It admits that the line of railway between Spartanburg and Gastonia, on the construction of which defendant was engaged at the time of the institution of this suit, will, upon its completion, connect and join together the existing sections of defendant's railway so that the same will form and

constitute, and may be operated as, a connected and continuous line of railway.

XVIII.

Defendant denies the matters and things alleged in Paragraph XVIII, and each and every part of said paragraph, with these exceptions: In I. C. C. Docket No. 12964, "In the matter of consolidation of railway properties of the United States into a limited number of systems", the Commission did undertake and purport to promulgate and approve the plan therein described. As the defendant is advised and believes said action of the Commission consists merely in the promulgation of a plan which is not compulsory and is subject to change. It does not adjudicate the status of defendant's railway, and no remedy is provided whereby defendant may protest against or object to said plan, or to the inclusion of its railway thereunder, unless and until some action is taken to carry out and execute said plan, and no such action has been taken.

XIX.

Defendant denies the matters and things alleged in Paragraph XIX, and each and every part of said paragraph. It specifically denies that it is owned and controlled by the Duke Power Company and its allied and affiliated interests; that there are or have been any illegal or improper relations or dealings between defendant and said Duke Power Company, or any of its allied or affiliated interests; or that defendant, or any other (63) party on its behalf or with its knowledge, has been guilty of illegal acts and practices in influencing, or attempting to influence, the control and delivery of freight to the defendant, or its removal from the competitive reach of the intervenors, or any of them, as alleged in the bill of intervention and complaint. The Duke Power Company, and its affiliated and allied power interests, are large receivers of freight in those parts of the Piedmont section of North and South Carolina in which the Duke Power Company operates; and where the plants of said Duke Power Company, and its affiliated and allied interests, are accessible to the lines of the defendant,

it has sought to participate in the handling of said freight to the extent that it has been able to do so, and expects to continue its efforts in these respects; but the revenues which the defendant has received from this source are very much less than those which the intervenors have received, and the defendant's revenues from the freight of said Duke Power Company, and its affiliated and allied interests, will not, and cannot, be materially increased, or otherwise affected, by the construction of the line from Spartanburg to Gastonia, for the reason that, as defendant is informed and believes, neither the Duke Power Company, nor any of its allied or affiliated interests, has any plant producing freight of any consequence, in the territory between Spartanburg and Gastonia.

XX.

Defendant denies the matters and things alleged in Paragraph XX, and each and every part of said paragraph. The Duke Power Company, and its affiliated and allied power interests, are large receivers and consumers of coal, most of which is transported and handled over the lines of the intervenors, or some of them, and and the revenues which the intervenors receive, and will continue to receive, very greatly exceed those which (64) the defendant receives, or will receive, from said coal. Defendant specifically denies that the line from Spartanburg to Gastonia, will connect with the Norfolk & Western Railroad, or with any other railroad or railway which defendant's railway does not now connect; and specifically denies that said line will materially affect in any way the participation by the intervenors, or any of them, in the transportation of coal to the Duke Power Company, or to any of its allied or affiliated interests. Defendant's existing lines were not constructed, and the line from Spartanburg to Gastonia is not being constructed, to serve the Duke Power Company or any other Duke interest, except as a part or parts of the shipping and travelling public lawfully entitled to use said lines. The existing lines were constructed in response to a demand in the Piedmont section for interurban electric railway service, especially for the operation of pick-up and delivery lines within said section,—

a service which was not being performed at and prior to the time of the construction of the defendant's existing lines by the intervenors operating in said section. This demand still exists, (and as showing the lawfulness of the defendant's purpose in constructing the line from Spartanburg to Gastonia, it alleges that the construction of said line is advocated and approved by the State, County and Municipal authorities of the States of North and South Carolina, and of every county, city and town through which said line will extend, by trade and civic organizations, and the entire shipping and travelling public of the territory, and is opposed by no party doing business in said section, except the intervenors). Many of defendant's Directors are interested in textile mills and other industries in the Piedmont section, but defendant denies that they became members of its Board for the purpose of unlawfully controlling the traffic of such (65) mills and industries for the benefit of defendant, and denies that its officers and directors have been guilty of any unlawful acts or practices in the management and direction of its affairs, as alleged in the bill of intervention and complaint.

## XXI.

Defendant denies the matters and things alleged in Paragraph XXI (erroneously numbered XV), and each and every part of said paragraph. As showing that the defendant has not been guilty of violating the Commodities Clause, or any of the provisions of the Interstate Commerce Act prohibiting rebating and discrimination, in its dealings and relations with the Duke Power Company, or any other Duke interest, defendant alleges that these dealings and relations have existed for the past fifteen years, that during all of this period there has never been any charge or complaint by the Interstate Commerce Commission, or any other public authority charged with the administration and enforcement of the laws governing and controlling defendant in the conduct of its business, that defendant has ever been guilty of the violation of any of said laws, or of any improper or unlawful practice in connection with such dealings, and no such charge or complaint is made by the Interstate Commerce Commission in this suit,

in either its original or amended bill of complaint. Defendant is further advised and believes that the allegations of the bill of intervention and complaint that it has been guilty of such unlawful acts and practices are irrelevant and impertinent to the issues involved in this suit, for the reason that if the defendant has the right to construct a line of railway from Spartanburg to Gastonia upon the grounds asserted by the defendant, or either of them, without first obtaining from the Interstate Commerce Commission a certificate of public convenience (66) and necessity, such right cannot be denied the defendant because of its alleged violation of other statutory provisions separate and distinct from those relating to new construction, nor can such alleged violations confer on the Interstate Commerce Commission an authority over new construction which Congress has expressly withheld from it.

XXII.

Defendant denies the matters and things alleged in Paragraph XXII, and each and every part of said paragraph, with these exceptions: The Act of South Carolina incorporating the defendant does contain the proviso stated in said paragraph, and said period of ten years did expire on March 1, 1921; but defendant at all times retained, and has had, full and ample corporate power and authority to construct the line of railway from Spartanburg to Gastonia by means of subsidiary corporations which the defendant has the authority under its charter to organize, or to cause to be organized, in the same manner that its existing lines were constructed, to-wit, the South Carolina line by the Greenville, Spartanburg & Anderson Railway Company, and the North Carolina line by the Piedmont Traction Company; and in addition the State of South Carolina never took any action to enforce the forfeiture of any of the defendant's rights and franchises by reason of the expiration of said period of ten years, but on the contrary expressly waived the right to enforce any such forfeiture by an Act of the Legislature duly adopted January 27, 1927.

XXIII.

Defendant denies the matters and things alleged in Paragraph XXIII, and each and every part of said paragraph. The revenues of the intervenors from those parts of the Piedmont section served by defendant's ex-
(67) isting lines have materially increased since the construction of said lines, due in some measure at least to the contribution which defendant's lines have made to the growth and development of these parts of said section. The part of the Piedmont section between Spartanburg and Gastonia has not heretofore shown the same growth and development as the adjacent territory to the North and to the South through which defendant's existing lines extend, and as compared with said adjacent territory there is now little freight traffic having origin or destination in the territory between Spartanburg and Gastonia; but, as defendant is informed and believes, the construction of its line through this territory will contribute in large measure to its growth and development, so that the revenues of the intervenors operating in this territory, from freight traffic having origin or destination therein, will show increases comparable to those which these intervenors have received in the adjacent territory, to their great benefit and advantage.

XXIV.

Defendant adopts as further answers and defenses to the bill of intervention and complaint Paragraphs VII and IX of its original answer to the bill of complaint in this suit as if said paragraphs of its original answer were herein set out in the same words.

Wherefore, having fully answered defendant prays that the bill of intervention and complaint of the Southern Railway Company and other steam railroads, be dismissed, and for such other and further order as may be appropriate.

H. J. HAYNSWORTH,
J. H. MARION,
W. S. O'B. ROBINSON, JR.,
Solicitors for Defendant.

STATE OF NORTH CAROLINA,
(68) County of Mecklenburg.

N. A. Cocke, being first duly sworn, deposes and says:

That he is an Officer of the Piedmont and Northern Railway Company, the defendant in the above entitled suit, to-wit, its Vice-President and Treasurer, that he has read the foregoing Answer and knows the contents thereof, and that the same is true of his own knowledge except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

N. A. COCKE.

Sworn to and subscribed before me, this 6th day of June, 1930.

(Seal) JAS. S. SEASE,
Notary Public.

Com. exp. 6-18-31.

**ORDER.**

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
(69) WESTERN DISTRICT OF SOUTH CAROLINA.

| | |
|---|---|
| Interstate Commerce Commission, Southern Railway Company, Charleston & Western Carolina Railway Company, Atlantic Coast Line Railroad Company, Louisville & Nashville Railroad Company, Carolina, Clinchfield & Ohio Railway, Carolina, Clinchfield & Ohio Railway of South Carolina and Clinchfield Northern Railway Company of Kentucky, Plaintiffs, *vs.* Piedmont & Northern Railway Company, Defendant. | Equity No. 253. |

This case came on to be heard before me on the

— day of June, 1930 at Greenville, S. C. on motion of the defendant, Piedmont & Northern Railway Company, to strike out as irrelevant and incompetent the allegations contained in Paragraph 5 of the Amended Bill of Complaint filed by the Interstate Commerce Commission, and paragraphs 6, 7, 8, 9, 10, 11, 12 and 14 and a portion of paragraph 13, and paragraphs 18, 19, 20 and 21, contained in the Bill of Intervention filed by the steam railroads.

After hearing full argument on both sides and upon due consideration of the case I am of the following opinion:

(1) The allegations in paragraph 5 of the Amended Complaint filed by the Interstate Commerce Commission and paragraphs 6, 7, 8, 9, 10, 11, 12 and 14 and that portion of paragraph 13 of the Bill of Intervention which (70) reads as follows:—"In the face of and in spite of the denial by the Commission of such certificate", and "for which certificate of the Commission had been previously sought and denied", all relate to the proceedings before the Commission and Three-Judge Court and should be stricken.

(2) The allegations contained in paragraph 18 of the Bill of Intervention, filed by the Railroads, relate to the plan adopted by the Commission for the consolidation of railroad properties and should likewise be stricken.

It is Therefore Ordered, Adjudged and Decreed:

(1) That the defendant's motion be, and the same is, hereby granted in so far as it relates to the allegations contained in paragraph 5 of the Amended Bill of Complaint, filed by the Interstate Commerce Commission, and paragraphs 6, 7, 8, 9, 10, 11, 12, 14 and 18 and that portion of paragraph 13 of the Bill of Intervention filed by the Railroads which reads as follows:—"In the face of and in spite of the denial by the Commission of such certificate", and "for which certificate of the Commission had been previously sought and denied",

and all of said allegations are hereby ordered stricken from the pleadings.

(2) That the defendant's motion in so far as it relates to the allegations contained in paragraphs 19, 20 and 21 (erroneously numbered 15) of the Bill of Intervention is hereby refused.

(signed) J. LYLES GLENN,
United States District Judge.

September 2nd, 1930.

**DEFENDANT'S REQUEST FOR SPECIAL FINDINGS OF FACT.**

(71) (Style of Court and Caption of case Omitted.)

In Equity No. 253.

The defendant respectfully requests the Court to make the following findings of fact:

I.

The Piedmont and Northern Railway Company was incorporated by Special Act of the Legislature of South Carolina, approved February 24, 1911, which was amended by Special Act approved January 27, 1927. It is authorized and empowered to construct or otherwise acquire, and to operate lines of railway and street railway to be operated by electricity or other motive power, and is engaged as a common carrier in the transportation of persons and property in interstate commerce.

II.

The defendant owns and operates a line of railway in South Carolina, extending from Greenwood to Spartanburg, a distance of 89.9 miles, with a branch from Belton to Anderson of 11.3 miles; a line in North Carolina from Gastonia to Charlotte a distance of 23.5 miles, with a branch to Belmont of 3.2 miles, the street railway sys-

tem in Gastonia, North Carolina, and has trackage rights over the street railway systems in Charlotte, North Carolina, and Greenville and Anderson, South Carolina. Of its main line mileage of 127.90 miles, 15.13 miles are operated jointly with eleceric street cars, and in addition to the main line mileage defendant owns and operates 37.24 miles of sidings and turnouts.

III.

On March 11, 1930, defendant began work at Spartanburg, South Carolina, and at Gastonia, North Carolina, on the construction of a line of railway between said points, with the intention to complete the construction of said line of railway and to engage in transportation in interstate commerce over and by means of same. It has obtained from the Interstate Commerce Commisssion no certificate of public convenience and necessity under Section 1, Paragraphs (18), (19) and (72) (20) of the Interstate Commerce Act to construct and operate said line of railway.

IV.

The line of railway between Spartanburg, South Carolina, and Gastonia, North Carolina, if constructed, would be constructed and equipped in the same way and have the same characteristic as the defendant's existing lines; and, if completed, would connect and join together defendant's existing lines and be operated in connection with them as a part of defendant's railway, which would then extend, as a continuous line, from Greenwood, South Carolina, to Charlotte, North Carolina.

V.

Its railway throughout all its lines and parts is, and has always been, operated exclusively by electricity as a motive power; and it is owned, controlled, managed and operated by the defendant independently of any steam railroad system.

VI.

It was designed, constructed and equipped to afford the territory through which it operates a quick and convenient service, at frequent interyals, for both freight and passenger traffic; and is similar in all essential respects to many electric railways constructed and put into operation prior to 1920, commonly described as interurban electric railways.

VII.

The main line track is laid with 80 lb. rails, and the branch lines with 56 lb. rails, except the Anderson branch which has 70 lb. rails. The rails are bonded together with 0000 copper so as to constitute a return circuit for the electricity. The roadbed is well constructed and ballasted and the cross ties sound and adequate for their purpose. On the North Carolina division the maximum grade is 1% on the main line, except on Graham Street, entering Charlotte, where it is 5.6%, on Mint Street in Charlotte, where it is 3.5%, and on Franklin Avenue, in Gastonia, where there is a grade slightly over 4%. On the main line division in South Carolina, between (73) Spartanburg and Greenwood, the maximum grade is 1%, and on the Anderson branch 2½%. The maximum curvature on the main line of the North Carolina division is 10 deg.; and on the South Carolina division 6 deg.

VIII.

The voltage used in the operation of defendant's railway is 1,500 direct current supplied through an overhead trolley supported by poles, except that in Charlotte, North Carolina, and Greenville and Anderson, South Carolina, 750 volts is used in operating over the street railway systems in these cities, and in order that this may be done all cars and locomotives are equipped so that the voltage may be immediately reduced from 1,500 to 750 volts. On main line electrified sections of steam railroads it is customary to use either 3,000 volts direct current or 11,000 volts alternating current, and the voltage in use on defendant's railway would be unfit for a

line with a long haul heavy load traffic. The substation capacity of defendant's entire system is 10,600 Kilowatts, or approximately 75 Kilowatts per mile, whereas on electrified sections of steam railroads the substation capacity is at least 150 and runs as high as 1,000 Kilowatts per mile. Defendant's signal system is a selective control block system in common use on electric railways known as interurban, and it would not be suitable for use on a main line steam railroad.

## IX.

The defendant has 17 electric locomotives, varying in weight from 55 to 100 tons. They are of the type commonly known as interurban electric locomotives; are lighter and smaller than those ordinarily used on electrified divisions of steam railroads, and would not be suitable or feasible for use on a railroad with a long haul heavy load traffic. The locomotives are arranged for multiple unit control so that two of them can be coupled together and operated by one motorman. The larger locomotives weighing approximately 100 tons are the equivalent of two 50 ton locomotives perma- (74) nently coupled together or articulated with a single cab over them. The locomotives are constructed on swivel type trucks, and the motors used on them are similar to those used on the passenger cars, except that they are geared so as to give the locomotives greater tractive power with correspondingly less free running speed. All of them are designed and equipped so that they can be used over all parts of defendant's system, and in all manner of operations, the same locomotive being used for switching and main line operations. It has 19 passenger cars and all of them except two, which are used as trailers, are motivated by self-contained motor units and are equipped with double end control so that the motorman can operate on either end. The passenger cars are of the standard interurban electric railway type, are equipped with radial drawbars enabling them to take sharp curves and are lighted in series from the trolley. It has 287 freight cars, 1 business car, 2 express cars, 6 combination cars with electric equipment, 16 work cars and 11 caboose cars. Only the freight

cars and the business car are interchangeable with steam railroads.

X.

Defendant's railway connects and ties in with the street railway systems in Gastonia and Charlotte, North Carolina, and in Greenville and Anderson, South Carolina; it uses these systems to pick up and deliver freight within the cities, and outside and between the cities freight is picked up and delivered and switching performed all along the lines. Its passenger cars make frequent stops averaging 1.2 miles apart; and its freight trains are operated in smaller units, run more frequently, and make more frequent stops than is customary in the case of the ordinary steam railroad.

XI.

In 1928, which the court finds to be a typical year fairly representative of the defendant's operations, the average number of passenger cars per train on defendant's railway were 1.6, as compared with an average of 6.3 for all Class 1 steam railroads of the Southern district; the average number of loaded and empty freight (75) cars per train on defendant's railway was 20, as compared with an average of 40 for the Class 1 steam railroads of the Southern district; and the average number of tons of revenue freight per train on the defendant's railway was 230 tons, as compared with an average of 740 tons per train for the Class 1 steam railroads of the Southern district. For the same years defendant's maintenance cost was $1,700 per mile, as compared with $4,800 for the Class 1 steam railroads of the Southern district. The average capacity of defendant's passing tracks on its North Carolina division is 29 cars, and on its South Carolina division 25 cars, as compared with a capacity in the case of steam railroads varying from 120 to 57 cars.

XII.

The defendant, in addition to a passenger, mail and express business, is engaged in the general trans-

portation of freight. It has traffic arrangements and interchanges freight, in carload as well as less-than-carload lots, with connecting steam railroads, and participates with steam railroads in the division of numerous joint rates. In 1929 95.7% of defendant's freight revenue came from interline traffic, and 80.7% of the freight revenue from interstate traffic; while 2.2% of its passenger revenue was from interline traffic, and 0.4% from interstate traffic.

XIII.

Defendant's freight and passenger revenues, and the ratio of passenger revenue to freight revenue, from January 1, 1916, to June 30, 1930, were as follows:

| Year | Freight Revenue | Passenger Revenue | Ratio of Pass. Rev. to Freight Revenue |
|---|---|---|---|
| 12-31-16 | $742,668.68 | $397,366.77 | 53.50% |
| 12-31-17 | 862,414.65 | 555,430.04 | 64.40 |
| 12-31-18 | 727,913.17 | 871,755.17 | 119.76 |
| 12-31-19 | 653,660.59 | 619,305.88 | 94.74 |
| 12-31-20 | 1,026,734.58 | 678,269.96 | 66.06 |
| 12-31-21 | 1,215,512.20 | 464,071.52 | 38.17 |
| 12-31-22 | 1,426,806.17 | 426,981.10 | 29.92 |
| 12-31-23 | 1,887,610.60 | 390,282.11 | 20.67 |
| (76) | | | |
| 12-31-24 | 1,835,905.32 | 276,846.13 | 15.07 |
| 12-31-25 | 2,172,288.41 | 178,689.38 | 8.22 |
| 12-31-26 | 2,288,091.98 | 138,539.68 | 6.05 |
| 12-31-27 | 2,340,809.58 | 124,154.28 | 5.30 |
| 12-31-28 | 2,185,110.36 | 108,279.18 | 4.95 |
| 12-31-29 | 2,317,528.77 | 71,562.72 | 3.08 |
| 1- 1-30 to 6-30-30 | 1,024,737.42 | 18,482.95 | 1.80 |

XIV.

There has been no change in the character of defendant's railway since it was first put in operation, so that neither the decrease in its passenger revenue nor the increase in its freight revenue can be attributed to a change

in the character of the railway. The loss of passenger revenue followed the construction of improved highways throughout the territory where defendant operates, and has been due to the increased use of private automobiles and the competition of motor busses. The gain in freight revenue has been due in part to the industrial development of the territory and in part to the efforts of the defendant to increase and expand its freight traffic so as to make up for the loss of passenger traffic.

XV.

The defendant handles all freight moved over its lines in the manner hereinbefore stated, making no distinction between local freight which has both origin and destination on its lines, and interline freight, which is interchanged wth connecting steam railroads.

XVI.

The project which led to the construction of defendant's existing lines was formulated about 1910, the plan being to construct a system of electric lines in the Piedmont Section of North and South Carolina which would afford a quick service at frequent intervals, for both freight and passenger traffic; and the lines were designed and intended to connect and tie in with the street railway systems in the cities en route.

XVII.

(77) A Syndicate, known as the "Piedmont Syndicate", was formed for the purpose of acquiring the street railway lines and constructing the interurban lines. The plan was announced to the public and many people residing along the route of the proposed lines in both North and South Carolina became subscribers to the agreement.

XVIII.

The properties first acquired were the street railway system of Anderson, Greenville and Charlotte. They

were acquired in order that the interurban lines might tie in with these systems, thereby securing trackage rights over them.

XIX.

In pursuance of this project, the Greenville, Spartanburg & Anderson Railway Company was incorporated in March, 1910, under the general laws of the State of South Carolina. It acquired the existing interurban electric railway extending from Belton to Anderson, a distance of 11 miles, and constructed the line in South Carolina from Greenwood to Spartanburg—this was completed in 1914.

XX.

The Piedmont Traction Company was incorporated on January 6, 1910, under the general laws of the State of North Carolina, as a street railway company. It constructed the line in North Carolina between Gastonia and Charlotte, and also the street railway system in Gastonia.

XXI.

The section of road between Gastonia and Charlotte was completed and put in operation in July, 1912; the section between Greenwood and Greenville in November, 1913; and between Greenville and Spartanburg in April, 1914.

XXII.

By deeds from the Piedmont Traction Company and the Greenville, Spartanburg & Anderson Railway Company dated, respectively, May 20, 1914, and June 10, 1914, all of the property then owned by these corporations, respectively including the railway lines between (78) the cities in North and South Carolina, the street railway system in Gastonia, and the trackage rights over the street railway systems in Anderson, Greenville and Charlotte, were conveyed to the Piedmont and Northern Railway Company, which had been incorpo-

rated as hereinbefore stated for the purpose of carrying out the project.

XXIII.

On July 1, 1914, the Piedmont and Northern Railway Company executed to the Farmers' Loan & Trust Company of New York, as Trustee, a mortgage upon said railway lines and all properties and franchises belonging to the Railway Company, to secure an authorized issue of $50,000,000.00 First Mortgage 40 Year Gold Bonds. The purpose of this mortgage was to pay for the work which had been done, to reimburse the subscribers to the Piedmont Syndicate, and to provide funds for the completion of the railroad, as proposed.

XXIV.

Prior to April, 1914, certain real estate had been acquired in Spartanburg for the purpose of extending the line North of Spartanburg to Gastonia, and some engineering work had been done on this link.

XXV.

The further extension of the work was suspended on account of the outbreak of the World War in the summer of 1914. The entrance of the United States into the War was followed by the Federal control of railroads, and Piedmont and Northern Railway, with six other interurban electric railways, was taken over by the Government and operated until March, 1920, when it was returned to the corporation owners.

XXVI.

After the termination of Federal control, further delay was incurred on account of the run down physical condition of defendant's property, the disruption of its business, the unsettled condition of the financial market and the excessively high prices for material and labor which followed the War.

XXVII.

(79) While the delay was long continued and has not been explained wholly to my satisfaction, I find no evidence of a purpose on the part of the Railway Company or of those in control of the Railway Company to abandon the completion of the project.

**CONCLUSIONS OF LAW.**

Upon the foregoing findings of fact the court states its conclusions of law.

I.

The defendant is an "interurban electric railway" within the meaning of the exemption contained in Paragraph (22) of Section 1 of the Interstate Commerce Act, as amended by Transportation Act, 1920, and is not "operated as a part or parts of a general steam railroad system of transportation" within the meaning of said paragraph.

II.

The uncompleted line of railway between Spartanburg, South Carolina, and Gastonia, North Carolina, is part of a unitary project calling for the construction, equipment and operation of a railway from Greenwood, South Carolina, by and through the cities of Greenville, Spartanburg and Gastonia, to Charlotte, North Carolina, which project was undertaken prior to the effective date of Paragraphs (18) to (21) inclusive, of Section 1 of the Interstate Commerce Act, as amended by Transportation Act, 1920.

III.

The defendant is lawfully entitled, without obtaining from the Interstate Commerce Commission a certificate of public convenience and necessity under Section 1, Paragraphs (18), (19) and (20) of the Interstate Commerce Act, to construct the proposed line of railway from Spartanburg, South Carolina, to Gastonia, North

Carolina, and upon its completion to operate the same in the transportation of persons and property in interstate commerce in connection with its existing lines of railway.

Respectfully submitted, this 29th day of December, 1930.

W. S. O'B. ROBINSON, JR.,
R. S. HUTCHISON,
H. J. HAYNSWORTH,
Attorneys for Defendant.

**STATEMENT OF EVIDENCE UNDER RULE 75 (b).**

(Style of court and Title omitted.)

(80) The following is defendant's condensed statement in narrative form of the evidence introduced upon the trial, made in pursuance of Equity Rule 75 (b) and lodged in the Clerk's office for the examination of plaintiffs, as provided by said rule. It contains all the evidence bearing on the issues and questions involved in this suit, as well as a statement of the scope and substance of all the exhibits bearing on these issues and questions.

(81) Interstate Commerce Commission introduced as its Exhibit 1 resolutions of the Board of Directors of Piedmont and Northern Railway Company, adopted March 10, 1930, as follows:

Mr. W. S. Lee, the President of the Company, stated that the meeting had been called for the purpose of discussing with the Directors the opinion the United States Supreme Court delivered February 24, 1930, in the case of Piedmont and Northern Railway Company *vs.* United States, Interstate Commerce Commission, Southern Railway Company, and others, involving the Company's right to complete its lines, and of advising with the Directors about the steps to be taken in view of the decision and opinion of the court. He laid before the Board a copy of the opinion, and stated that he was advised by counsel of the company that the decision of the court does not determine the Company's right to proceed with

the completion of its lines, but leaves this question for future determination in the event the right to complete the lines should be further denied and contested. He called attention to the statement in the opinion that the right of the Company to proceed with the proposed construction is not affected or controlled by the ruling of the Interstate Commerce Commission in its report of April 3, 1928, and read to the Board the following language from the opinion:

"Neither the assumption of jurisdiction by the Commission nor its denial of the application can operate as *res judicata* of the railway's claim of immunity. If, as is contended, the Commission was without jurisdiction, the railway is as free to proceed with the construction as if the application had not been made and the Commission had not acted. Nothing done by the Commission can prejudice the railway's claim to immunity in any other proceeding."

(82) The matter was thereupon thoroughly discussed in detail by all of the Directors present.

Upon motion of Capt. E. A. Smyth, duly seconded by Mr. A. F. McKissick, the following resolution was unanimously adopted:

"BE IT RESOLVED, That the completion of the lines of the Company as the same were originally projected and planned to extend through the Piedmont Section of North and South Carolina from Greenwood and Anderson on the South, to Durham and Winston-Salem on the North, not be abandoned, and said original plan and project is hereby reaffirmed and approved."

Upon motion of Mr. J. P. Gossett, duly seconded by Mr. J. H. Separk, the following resolution was unanimously adopted:

"BE IT RESOLVED, That the officers of the Company be, and they hereby are, directed and instructed to proceed toward the completion of the lines of the Company as originally planned and projected, by forthwith commencing construction upon and prosecuting to

completion, with due diligence and dispatch, the line from Spartanburg, South Carolina, to Gastonia, North Carolina, which will connect and join together the existing lines of the Company."

The Commission offered as its Exhibit 2, application of the Piedmont and Northern Railway Company, filed March 26, 1927, before the Interstate Commerce Commission under Docket No. 6208, entitled "Piedmont and Northern Railway Company, Application for Construction of Lines", which in substance states that the Piedmont and Northern Railway Company is chartered under the laws of the State of South Carolina; is a carrier by railroad subject to the Interstate Commerce Act; that for the reasons hereinafter stated, the position of the applicant is that it is not subject to the provisions of the Act embodied in paragraphs 18 to 21, of Section 1, or Section 20a; applicant proposes to com-
(83) plete the construction of certain portions of its lines, the completion of which had been suspended and deferred after important work in connection therewith had been done; the present operated lines are portions of applicant's entire project, and the work now to be performed is in furtherance of the completion of the lines of which the existing portions are parts. Applicant is independently owned, and except as a connecting carrier has no relation with any other operating or non-operating railroad, but it uses certain street railway and other tracks under trackage arrangements.

The present operated lines extend from Spartanburg, South Carolina, through Greenville to Anderson and Greenwood, and from Gastonia, North Carolina, to Charlotte. It was contemplated from the beginning the project should consist of an interurban railway extending from Greenwood and Anderson on the South to Winston-Salem and Durham on the North. It is proposed to construct that portion of the line between Spartanburg and Gastonia, a distance of 53 miles, and that portion of the line from Charlotte to Winston-Salem, a distance of 75 miles. These pieces of construction have always been considered essential portions of the line. Much work has already been done from time to time toward completing this construction. The territory tributary to the line thus to be completed is generally known

as the Piedmont Section of North and South Carolina, in which there is now going on a very large industrial development.

Transportation facilities designed and operated particularly to serve the local needs must be provided with improved and increasing connections between those local facilities and carriers reaching outside territory.

(84) Petitioner was incorporated by the legislature of the State of South Carolina, on February 24, 1911, with authority to construct and operate and acquire stock and physical properties of other companies in South Carolina or in any other state. It was authorized to operate in the State of North Carolina, under the general law of that state. In 1927, the legislature of North Carolina passed a general law authorizing interurban electric railways organized under North Carolina laws, or the law of any other state, to engage in business in North Carolina, and to exercise the right of eminent domain, provided that no such interurban electric railway, when organized under the laws of another state, shall operate its line in North Carolina by steam motive power, or as a part of a general system of steam transportation. Applicant operates and proposes to operate under said law. The filing of this application was authorized by the Board of Directors of the Piedmont and Northern Railway Company, by resolution dated March 21, 1927.

The proposed mileage will be situated in North and South Carolina, extending from Spartanburg to Gastonia, connecting the two present lines, which connecting link will pass through Gastonia and Kings Mountain and extending from Charlotte, North Carolina to Winston-Salem, passing through Kannapolis and Salisbury; the length of main track of the proposed construction is 53 miles between Spartanburg and Gastonia, and 75 miles between Charlotte and Winston-Salem. Attached to the application is a map of the proposed route between Spartanburg and Gastonia, and two maps indicating location of two routes between Char-
(85) lotte and Winston-Salem. At a later date a map showing the exact location will be provided if desired. Applicant submits that the work involved is not the construction of a new line of railway or an extension with n the scope and meaning of Paragraph 18 of Section 1,

but is the continuance of work necessary to complete an original unfinished project begun prior to the time of the Transportation Act of 1920, and therefore is not subject to the provisions of that paragraph. The map of the property, as carried in the Railway Guide as early as 1916, showed the projected line from Anderson to Durham. A terminal and connection at Winston-Salem was secured by a purchase of the street railway system there in 1913. Construction of the Spartanburg-Gastonia link and additional mileage North of Charlotte was planned to be done prior to 1920. Surveys were made, construction plans in process of formulation, and present parts of the line were acquired or constructed. The World War and conditions produced thereby delayed the carrying out of these plans; the plan has never been abandoned; continuation of the work has been a subject of constant consideration; from time to time the directors and officers of the company have discussed as to when and how rapidly the work involved in the completion of the project should be carried on; in fact, the work involved in the completion of the project has continuously been going on in the sense that plans have constantly been under consideration and formulation, and such steps have been taken from time to time as sound construction *proceedure* seemed to suggest.

Applicant submits that it is an interurban electric railway not operated as a part or parts of a general (86) steam railroad system of transportation, and as such is excluded by Paragraph 22 of Section 1 of the Interstate Commerce Act from the authority conferred upon the Commission by Sections 18 to 21 of that Act. Applicant's operations have always been carried on in the manner of an interurban electric railway. It is advised by its counsel that it is now operated as such an interurban electric railway and that the proposed mileage, as well as the existing lines will constitute an interurban electric railway property. It is in no espect a part of any steam railroad system of transportation.

The Commission is requested to segregate and first pass upon the question of jurisdiction involved. It is important that the work be begun with the least possible delay; applicant is ready to commence work immediately if if is not required to obtain a certificate of convenience and necessity. It has already placed large quantities of mateials on the ground and incurred large ex-

pense under advice that it was not necessary to obtain a certificate.

Applicant's lines differ radically from those of the standard railway in the purpose for which constructed, in the function performed and the service rendered. The road has been constructed and operated as a contributing factor in the development of the Piedmont Section of North and South Carolina, which development had become the prime aim and purpose of J. B. Duke during the latter portion of his life. In connection with his hydroelectric enterprises, Mr. Duke, through his companies, the Southern Power Company and the Southern Public Utilities Company, had acquired and was operating street railway systems in such cities (87) as Winston-Salem, Charlotte, Greenville and Anderson. The Piedmont and Northern Railway had its inception as a part of Mr. Duke's scheme in this development; it was to unite by an electric interurban service the electric railways mentioned, was to extend from Winston-Salem and Durham on the North to Anderson and Greenwood on the South, and when organized the trust indenture was so drafted that sufficient bonds were issued for this purpose as and when the plans could be carried out. The present portions of the lines were never intended to be the whole of the road. From the start it was contemplated to fill in the gap between Gastonia and Spartanburg and make the Northern extension from Charlotte to Winston-Salem and Durham. The P. and N. Railway was an integral part of this development. Mr. Duke contemplated the interurban service which it rendered would tie up the cities, towns and villages in a transportation system which the steam railroads could not supply, which would greatly tend to their development; he contemplated furnishing elastic and efficient transportation. The Piedmont and Northern is a local interurban enterprise, conceived, organized and operated to upbuild the community which it serves.

Coming to the characteristics of the property as a railway property, attention is called to the following facts: It is operated as admittedly interurban properties customarily are operated. It ties into the street railway systems. Its passenger cars, locomotives and its motor cars are designed to operate where there is a high degree of curvature, as in cities. It makes fre-

quent stops, averaging 1.2 miles apart, considering al-
(88) ways the purpose of rendering the best local service. Its passenger cars are motivated by self-contained motor *unites,* except a few trailers which are attached to cars containing such motor units. The type of construction of the line is that of the standard interurban. Power is furnished by overhead trolley. The rails are bonded for return circuits. Cars and locomotives are so constructed as to operate over curves with a 50-foot radius, making it possible to make the right angle city turns.

Passenger cars are lighted in series from the trolley. They are equipped with radial drawbars, enabling them to turn sharp curves and making them unacceptable upon steam lines. Only its box cars and automobile cars are suitable in character for exchange with steam lines. The box and automobile cars are used mainly for local traffic, although from time to time they are exchanged with steam lines.

The personnel is in all respects similar to that to be found on other interurban lines, such as motormen, conductors, electrical workers, electrical repairmen, etc. The personnel is largely recruited from street railway companies and is not selected so as to be qualified to operate a standard railway. Frequent passenger service is maintained over all lines, there being stops at such frequent intervals as are appropriate in urban and interurban service.

The freight traffic is hauled by electric locomotives having various tonnage ratings, designed to serve local conditions, as they vary on different portions of the lines. These locomotives were purchased particularly for use on the lines of this company and are adapted for use only under the particular circumstances and
(89) conditions of traffic prevailing on applicant's property, or some similar interuban electric railway. The electric locomotive while of a size and type that render them available for use on applicant's interurban railway serving a local function, are unfit for a line with long-haul, heavy load traffic.

In the handling and dispatching of trains, there is used a selector system designed for the purpose of use by the dispatcher to throw the semaphore board so that untrained men will not overlook their orders. Such operating practices are not in use by steam railroads.

The cars and locomotives of the company were specially designed for use under the particular interurban conditions that prevail on the property. A 1,500 d. c. voltage is used on the interurban mileage between cities and at certain places in certain cities. The voltage used in the street railway service on the street railway lines in the cities is about 600. There is a switch arrangement provided on all locomotives and cars, so that the voltage coming into the motors is reduced, as the immediate condition requires, from 1,500 to 750, which will operate over the 600-volt line. Such practice is followed in Charlotte, Greenville, Anderson and will be folowed in Winston-Salem.

The applicant's interurban railway project serves cities in the Piedmont Section in which there are electric street railways operated by Southern Public Utilities Company (a corporation controlled by the same interests which control the applicant). These street railway systems are located in Charlotte and Winston-Salem, North Carolina, and Greenville and Anderson in South Carolina, and over them this applicant has traf-
(90) fic rights. In the City of Gastonia, North Carolina, the applicant itself owns and operates the street railway system. The electric interurban railway of the applicant is the transportation facility by which these cities are connected with each other. The cars and locomotives that handle the traffic of the applicant at and through Charlotte and Gastonia operate over street railway lines in those cities. The cars and locomotives of the applicant in operating over the street railway connections become in effect, where so operated, street railway facilities by virtue of the special design of cars and locomotives and the change of voltage.

Fright traffic is handled in cars that move through the streets of the cities and around curves of a higher degree of curvature than those on which a standard railroad usually operates. The urban operation in cities facilitates the interurban operation between the cities.

The freight traffic of the territory tributary to applicant's lines has steadily increased, mainly because of the increase of industries in territory served by the applicant's lines. The increase consists chiefly of commodities brought into the territory for use or produced there and shipped out. The purely overhead traffic amounts to only slightly over 2 per cent. The prepon-

derance of freight traffic, therefore, is directly due to the intensive aspect of the development brought about in these communities tied together and furnished transportation by interurban lines of railway.

It would appear that relatively the passenger traffic has fallen off. This is due very largely to the automobile and to buses. The new mileage which it is pro-
(91) posed to construct, tying together the present northern and southern portions and extending the northern portion to Winston-Salem, will tend greatly to increase its passenger traffic. This will result from the interurban character of the applicant with its frequent stops in connection with its long haul.

The large volume of freight traffic is repreesnted by concentration of traffic at particular points and over particular mileage. A very large percentage of the mileage does not show such a concentration of traffic or in fact any concentration. On a very important portion of the traffic the haul is short, and on a large portion of the lines the traffic density is light.

The increase in traffic of applicant has not been brought about by any change in the character of its property from an interurban electric railway to a standard railway, such as commonly uses steam power; in the opinion of applicant the most important factor contributing to the increase of traffic, is the fact that the property has at all times retained its local interurban character, which has enabled it to render a service not possible by the standard railway, while it also provided connections with outside lines. Because of its particular type of service the additional operating mileage is urgently needed and will be of special use.

The classification of the applicant as an interurban electric railway, as distinguished from a standard railway, is made by the officials of the states of North and South Carolina, and as already pointed out, has been emphasized by the statute under which the applicant operates in North Carolina.

(92) The Commission introduces as its Exhibit 5 the return of the Piedmont and Northern to the questionnaire of the Interstate Commerce Commission in connection with its application for permission to extend its lines in Finace Docket No. 6208.

The return states in substance that notice of the ap-

plication has been published in various newspapers, as provided by law. The Piedmont and Northern is a corporation organized under the laws of the State of South Carolina by charter approved February 24, 1911, and amended January 27, 1927. Applicant owns and operates sections of interurban electric railway as heretofore set out. The return further sets out the facts as heretofore stated in the application. The line will be constructed and operated by applicant; outstanding shares of applicant are 85,841; 34,309 of which are owned by Duke Farms Company and 10,090 by Duke Power Company. These companies are controlled by the Estate of James B. Duke and the Trustees of the Duke Endowment, the present address of both of which is 535 Fifth Avenue, New York. Several steam plants of the Southern Power Company and three additional such plants to be constructed by said Company are and will be served by applicant's line. A majority of the stock of the Southern Power Company is owned by the Duke Power Company. Authorized capital stock of applicant is 200,000 shares. None of the present outstanding stock was issued for the purpose of completing and constructing applicant's lines now in contemplation. The chief purpose of the proposed construction is to carry out the original plan of constructing an interurban railway in the Piedmont Section of North and South Carolina, from (93) Greenwood and Anderson on the South to Winston-Salem and Durham on the North. The lines when completed will afford local switching service, local passenger service with frequent stops, not generally supplied by steam railroads; will supply elastic and flexible transportation facilities and form connections with carriers reaching outside territory. The class of service will be an expansion of that now supplied; passenger, freight, express and switching; passenger service with stops averaging 1.2 miles apart; freight trains operated to best serve local and station to station movements, including frequent switching of industrial plants, being the best class of service supplied by interurban operation and which is not supplied by standard railroads, following standard railway practice. The motive power to be used is electric power. It is confidently expected that the lines when completed will receive material revenue from the territory served; the proposed lines will constitute a part of applicant's interurban system and be operated in

the same manner. It is expected that the lines when completed will increase the revenue on the existing lines, as they will enable applicant to render a more efficient service, and also afford additional connections with outside territory.

At the time of filing this return applicant has not definitely decided as to which of two routes between Charlotte and Winston-Salem will be followed, whether via Derita and Kannapolis, or via Concord. The only new connections that will be formed will be at Winston-Salem, North Carolina, said connections being the Southern, Norfolk and Western, Winston-Salem Southbound, and the street railway at Winston-Salem.

Applicant's line is the only interurban electric rail-
(94) way serving the industries mentioned in the return and the only line furnishing frequent stop service; such industries located at various points are served to an extent by the Southern Railway, Seaboard Air Line, Charleston and Western Carolina, Clinchfield, Norfolk and Western, Winston-Salem Southbound and the Carolina and Northwestern.

The proposed mileage will be built primarily for direct advantage and profit to be derived from railway operation, resulting principally from completion of applicant's interurban railway through the Piedmont Section of North and South Carolina. The work in contemplation will make applicant's present lines more profitable as it will connect and interrelate the territory tributary to the present lines and will render more efficient service throughout the entire territory. Such completed lines can be operated with greater economy.

Applicant's new mileage is not being constructed primarily for the purpose of constituting a connecting link between existing railroads, but the line when completed will perform the interurban service hereinbefore described and be used as a connecting link between existing railroads, and it is expected that the kind and volume of traffic which will be interchanged will be similar to that now moved and large in amount.

Applicant has agreements with the Southern Public Utilities Company, a corporation controlled by the same interests which control applicant, and has street railway systems in Charlotte, Wintson-Salem, Greenville and An-

derson. These agreements are for the use of such street railway tracks in Charlotte, Greenville and Anderson, (95) and a tentative agreement for the use of the tracks at Winston-Salem. Applicant has an agreement with the Seaboard Air Line, made in 1910, in reference to divisions on traffic to and from various points; this agreement had in contemplation the construction of the proposed lines of applicant. The method of operation and character of service will be the same on the new as on the old line.

The Commission introduced as its Exhibit 6 the supplemental return of the Piedmont and Northern to the Commission's questionnaire in Finance Docket 6208, filed May 13, 1927.

This exhibit states in substance that the new mileage is not being constructed primarily for the purpose of constituting a connecting link between existing railroads, but the line when completed will in addition to performing an interurban service as hereinbefore described, be used as a connecting link between existing railroads and it is expected that the character and volume of traffic which will probably be interchanged is as follows: Grain and grain products, 600 carloads; packing house products, 300 carloads, fruits and vegetables, 300 carloads, coal and coke, 2,100 carloads; building materials, 2,700 carloads; cotton and waste, 600 carloads; sand and stone, 300 carloads; merchandise, 1,800 carloads; automobiles, 900 carloads; gasoline and oil, 300 carloads; miscellaneous, 2,400 carloads; total, 12,300 carloads. It is possible for all of this bridge traffic to be handled by existing railroads.

(Question) 30. An estimate, in detail, of the character and volume of traffic expected and the gross revenue to be derived therefrom, covering each of the first five (5) years following the completion of the proposed (96) new line of railroad, together with an estimate of the annual revenue expected after the first five years. The detail estimate required for the first five years should show the amount of each class of traffic, the mean length of haul, the rate per unit, and the revenue to be derived. Chief points or territories of origin and chief points or territories of destination of traffic.

Applicant makes the following supplemental return to Paragraph 30 of the questionnaire:

| | Cars 1st Year | Mean Length Haul | Earnings per Unit | Gross Revenue 1st Year |
|---|---|---|---|---|
| Grain & Grain Products | 3,804 | | | |
| Packing House Products | 1,043 | | | |
| Fruits & Vegetables | 3,029 | | | |
| Coal & Coke | 13,860 | | | |
| Building Material | 5,613 | | | |
| Cotton and Waste | 11,326 | | | |
| Cotton Factory Products | 5,144 | | | |
| Sand and Stone | 1,900 | | | |
| Merchandise | 16,687 | | | |
| Automobiles | 4,343 | | | |
| Gasoline and Oil | 1,100 | | | |
| Fertilizer and Material | 969 | | | |
| Machinery | 349 | | | |
| Miscellaneous | 13,153 | | | |
| Total | 82,320 | 28.8 mi. | $43.70 | $3,597,384.00 |
| Passengers | 440,785 | | 44.58c | 196,502.15[1] |
| Express | | | | 70,260.76 |
| Miscellaneous | | | | 25,869.66 |
| Total Revenue first year | | | | $3,890,016.57 |

It is estimated that 21% of the freight traffic will have origin and destination on applicant's lines. Approxmately 44% will originate beyond and be destined to applicant's stations. Approximately 20% will originate on applicant's lines and be destined to points in other territories. Approximately 15% will be from and destined beyond applicant's lines.

(Question) 31. The estimated total gross revenue, operating expenses, net revenue and net railway operating income, corresponding with the estimates of traffic under paragraph 30. By "net railway operating income" is meant the excess of the credits over the debits to income, as reflected by the operating revenue, operating expense, railway tax accrual, uncollectible railway revenue, equipment rent, and joint facilities rent accounts.

| | | Gross Revenue |
|---|---|---|
| Total Revenue | Second Year | $4,216,777.96[2] |
| " " | Third Year | 4,570,987.31[3] |
| " " | Fourth Year | 4,954,950.24[4] |
| " " | Fifth Year | 5,371,166.06[5] |
| " " | Sixth Year and thereafter on substantially same basis of increase. | 5,822,344.01 |

(97) EXPLANATION OF REFERENCES SHOWN ABOVE:

[1] Average 1926 existing 127 miles per passenger ..... 44.58c
[2] Increase of 8.4% over first year.
[3] Increase of 8.4% over second year.
[4] Increase of 8.4% over third year.
[5] Increase of 8.4% over fourth year.

The above rate of increase is arrived at based on annual increase of business of existing lines for past five years, as follows:

| | Increase | Decrease |
|---|---|---|
| 1922 over 1921 | 10.9% | |
| 1923 over 1922 | 22.9% | |
| 1924 over 1923 | | 8.1% |
| 1925 over 1924 | 11.0% | |
| 1926 over 1925 | 5.3% | |
| Average | 8.4% | |

| | 1st Year | 2nd Year | 3rd Year |
|---|---|---|---|
| Gross Operating Revenue | $3,890,016.57 | $4,216,777.96 | $4,570,987.31 |
| Operating Expenses, including Taxes | 2,528,510.77 | 2,656,570.11 | 2,788,302.25 |
| Net Railway Oper. Income | $1,361,505.80 | $1,560,207.85 | $1,782,685.06 |

| | 4th Year | 5th Year | 6th Year |
|---|---|---|---|
| Gross Operating Revenue | $4,954,950.24 | $5,371,166.06 | $5,822,344.01 |
| Operating Expenses, including Taxes | 2,923,420.64 | 3,061,564.65 | 3,318,736.08 |
| (98) Net Railway Oper. Income | $2,031,529.60 | $2,309,601.41 | $2,503,607.93 |

(Question) 36. The following particulars as to the physical characteristics of the proposed new line of railroad:

(b) Weight of rail for main line tracks—100 lbs. per yard.

(f) The maximum rate of curves.

The maximum rate of curvature is from 8 to 10 degrees between cities, with as high as from 20 to 25 degrees and more, approaching and in cities, as stated in application.

(g) The average amount of curvature per mile in degrees—30 degrees per mile.

The Commission introduced as its Exhibits 7, 8 and 9, testimony of Mr. W. S. Lee on the hearing before the Examiner of the Commission in Finance Docket No. 6208, in substance, as follows:

W. S. LEE, President of the Piedmont and Northern Railway Company, testified before the Examiner that he had been connected with the Company and its predecessors, Piedmont Traction Company and Greenville, Spartanburg and Anderson Railway Company, from their formation, as an executive officer and chief engineer up to 1921, and since that time as president; participated in the organization of the Company and had charge of the construction of its lines; was associated with the late J. B. Duke and other gentlemen interested in its construction.

He became interested in the development of the Piedmont Section of the two Carolina between 1902 and 1904. In 1905 Southern Power Company was organized (99) by J. B. Duke witness and others; for the development of hydroelectric power plants; it became evident that there was a possibilty of making enormous industrial developments in this section. It soon became evident that while trying to keep up with the power distribution, it was going to be necessary to include railroad or transportation facilities.

They became convinced that if they could build a

high speed electric interurban railway which would connect the various towns and cities of the Piedmont Section and connect up the street railways that were electrically operated in them, that they could build a system that would be very useful and was very much needed.

They formulated a plan, which was announced to the public about 1910, of securing the various street railways and getting the necessary rights, charters and franchises for the purpose of completing this road. The matter was taken up with the various people along the line of the proposed development; that is, from Greenwood, South Carolina, on the South, to Durham on the North, connecting the various cities and towns along the line, such as Anderson, Greenville, Spartanburg, Gaffney, Charlotte, Salisbury, Winston-Salem, Greensboro and Durham. They purchased the street railway lines in Anderson; the interurban electric railway from Anderson to Belton a distance of about ten and a half miles; the Greenville Traction Company at Greenville, and the Electric Railway at Charlotte, N. C., which latter company had many miles of line in the City of Charlotte and several miles extending West which are now used as part of the Piedmont and Northern Railway System; secured franchises, permits and charters, and later began, section by section, the building of the lines, and putting them together so as to form the Piedmont and Northern System.

(100) The Winston-Salem street railway was purchased in 1913 or 1914. These street railway systems were purchased for the purpose of connecting up these lines.

Exhibit 1 before the Commission is a map showing the existing lines of the Company and also the new mileage; it shows the railway beginning at Greenwood and extending to Greenville and Spartanburg, with a branch from Belton to Anderson; the proposed line from Spartanburg to Gastonia; the present line from Gastonia to Charlotte and the proposed line from Charlotte to Winston-Salem.

These lines would not have been constructed or purchased if it had not been the purpose to make them parts of the through line of interurban railway extending from Greenwood to Durham and passing through intermediate points. The acquisition of these properties was for

the purpose of completing the whole, and no section was ever separately considered.

It was the purpose to connect with any or all of the trunk lines serving this section, as the proposed system was to gather up freight and give a service that the other carriers could not maintain, due to the type of road being constructed.

A fairly good type of construction of the main line was used with low grades and minimum curvature between cities; with a very high degree of curvature and excessive grades in the cities in order to reach points of manufacture; the road was built as a high speed electric interurban road, and was all DC-1500 volt. If these roads had been built for separate operation and not as part of a through system, nothing like as expensive type (101) of construction would have been used, because in a short line it would have been much cheaper to have spent a little more money for power and not so much for grading, bridges, etc. The Duke Power Company was built from time to time, and wherever industry needed power. I had many people in this section discuss with me the question of Mr. Duke becoming interested in their enterprises. The power Company subscribed to some industries along its line; most of these securities were subsequently sold; today we have comparatively few of them. With the exception of one property, we purchased very nominal amounts of securities in these industries.

These investments were not made for the purpose of securing traffic for the railroad; most of them were made at places to which we never built or intended building the railroad. The Power Company purchased stock in the following companies: Alice Cotton Mills, Easley, S. C.; Aragon Cotton Mills, Rock Hill, S. C.; Armond Mfg. Company, Mountain Island; this last mill was purchased in connection with water rights on the Catawba River and was afterward entirely destroyed by flood; Adrian Mfg. Company, Mt. Holly, N. C.; American Processing Company, Mt. Holly, N. C.; Carolina Cotton Mills, Greenville, S. C.; Duncan Mills, Greenville, S. C.; Glenn-Lowery Co., Whitmire, S. C.; Icemorlee Cotton Mills, Monroe, N. C.; Judson Mills, Greenville, S. C.; Norcott Mills, Concord, N. C.; Oakland Cotton Mills, Newberry, S. C.; Poinsett Mills, Greenville, S. C.; Rex

Spinning Company, Ranlo, N. C.; Thrift Spinning Company, Paw Creek, N. C.; Victor Monohan Mills, Greenville, S. C.; Westervelt Mills, Greenville, S. C.
(102) Its total investment in these mills was $850,625, all of which has been sold.

The Power Company today owns $5,000 stock in Lockmore Cotton Mill, York, S. C.; $20,000 in the Ranlo Company, Ranlo, N. C.; $25,000 in the Myers Mills, Gastonia, N. C.; $1,400 in the Industrial Mills, Rock Hill, S. C.; making a total of $51,400. It owns controlling interest in the Republic Cotton Mills, Great Falls, S. C., aggregating $1,588,890. This is the entire stock holdings of the Southern Power Company, other than its controlling interest in the Catawba Power Company and interest in other Duke Companies.

The Lockmore Mills is on the C. & N. W. and Southern Railways; the Ranlo Mills on the P. and N.; The Myers Mill on the Southern and C. and N. W.; the Industrial Mills on the Southern and the Republic Cotton Mills on the Seaboard.

The Duke Power Company has about 850,000 horsepower capacity; it has transmission lines crosswise of the States of North and South Carolina about 250 miles, and lengthwise about 450 miles; over 3,000 miles of high tension lines; the Power Company's output is 1,400,000,000 kilowatt hours per year, and is increasing at the rate of 150,000,000 to 200,000,000 kilowatt hours per year.

Mr. J. B. Duke died in October, 1925; his death made no difference in the growth and development of the Power Company, which is controlled by the Duke Endowment and some of the Duke Trusts.

The income from the $40,000,000 securities owned by the Duke Endowment is dispensed to charity to the extent of 80 per cent. 20 per cent of the income must be (103) reinvested in the Southern Power Company. We cannot buy securities in anything but government or state bonds except in Southern Power Company. The Duke Endowment is a perpetual trust created by Jas. B. Duke during his lifetime. The original trust fund was $40,000,000, and it will be increased by an additional $40,000,000 from the residue of Mr. Duke's estate.

The Power Company has projected plants ahead until 1932. It has just completed the construction of the

Oxford Shoals plant near Hickory, N. C., and will possibly during the year have to begin construction of another hydroelectric and another steam power station. It will have to put in about one steam plant every year and a half.

It has tentatively located three plants, one between Salisbury and Winston-Salem; one in South Carolina between Spartanburg and Gastonia; and another further down in South Carolina. The first two plants will be located on the proposed new mileage of the P. and N., and will require about 25 or 30 cars of coal per day each, 35 to 40 ton cars.

The Piedmont and Northern Railway was planned after giving consideration to the needs of this section. He intended to design and construct an interurban electric railway and thought he had done so; studied the then present state of interurban electric railways; the specifications for this road were based on the practice up to that time, but they went a little further, ahead of time, and improvements were added; 1500-volt direct current was used while at that time nothing higher than 1200 volts was being used. A complete examination of several electric interurban railways was made, and the (104) information thus obtained was used in formulating the specifications and plans of the Piedmont and Northern. The new mileage is to be built along the same line as the old.

The present sections of the Piedmont and Northern have been operated so as to render interurban service through this territory and it is proposed to operate the new mileage in the same manner.

The industries located in this section demand a quick and complete local service. The section is developing generally so that you can hardly get out of sight of one industry before seeing another. A flexible transportation service is needed, that operates around sharp curves and over steep grades, and that can give service at all times. The type of interurban electric railway now being operated, and which is proposed to be built, is such as can render that local service; it can gather up traffic from the various industries and handle it to the trunk lines and thereby reach the through business as well as serve the local business. In building the present lines

property was purchased for additional terminals and facilities to serve these purposes.

The P. and N. has working arrangements and contracts with the various steam lines which are now opposing the building of the proposed mileage and if these roads can get together and stop the completion of this line, there is no reason why they can not strangle to death what the Piedmont and Northern now has.

Comparing the service rendered by the P. and N. with that rendered by the steam railroads in the same territory, the P. and N. is operating in several cities and towns over the streets and over parts of the electric (105) railway lines which have been purchased; it is able to handle electric locomotives over sharper curves; in fact, practically turns street corners in a city; it can take an electric locomotive inside a building where it is impossible to carry a steam locomotive on account of the smoke, noise and dust. It can reach shippers in places where he does not believe it is possible to put a steam locomotive of standard type.

Exhibit 4 before the Commission is charter of the Piedmont Traction Company, dated January 6, 1910, which was obtained in connection with the plan to construct the interurban electric railroad heretofore described. The charter is for a street railway corporation was obtained under the general laws of the State of North Carolina. It constructed and later conveyed to the P. & N. the present line between Charlotte and Gastonia.

Exhibit 5 before the Commission is charter of the Greenville, Spartanburg and Anderson Railway Company obtained March 10, 1910, under the general laws of South Carolina. It acquired by purchase an existing interurban electric railway between Bolton and Anderson, constructed the present line between Greenwood and Greenville, and later conveyed both to the P. and N. and became merged with it.

Exhibit 6 before the Commission is the Piedmont Syndicate Agreement, dated January 10, 1911; James B. Duke, W. S. Lee and others are named as Managers. It recites that it is formed for the purpose of acquiring by purchase or construction or both a system, or a number of connecting or separate lines of railway for the (106) transportation of passengers and to the extent

permitted by law of freight in the several counties of Durham, Alamance, Guilford, Forsyth, Davidson, Rowan, Cabarrus, Mecklenburg, Gaston, Cleveland, etc., in North Carolina; and York, Cherokee, Spartanburg, Greenville, Anderson, Asheville, Greenwood, etc., in South Carolina. This Syndicate was formed for the purpose of carrying out the plan of constructing an electric interurban railway such as has been described through the Piedmont Section of the two states; its stock was offered the public along the line and there was a large number of subscribers, a thousand possibly, most of whom lived along or near the projected line between Greenville and Durham. When subscriptions were taken it was explained that the Piedmont Syndicate proposed to build a line of railway from Greenwood to Durham and other points on or near that line. It was formed as a matter of convenience to acquire such existing lines and build such new lines as were necessary to carry out this purpose.

Exhibit 7 before the Commission is the charter of the Piedmont and Northern Railway Company, which was incorporated by Special Act of the General Assembly of South Carolina, approved February 24, 1911, with a capital stock of $5,000,000 with power to construct and operate a line or lines of railway to be operated by electricity or other motive power beginning at a point on the North Carolina boundary line and extending through certain Counties in South Carolina to the Georgia line. The condition was imposed that unless the corporation should commence actual construction of its lines in any of the Counties mentioned within ten years from March 1, 1911, all rights to enter such County should expire. (107) Power was given to construct, acquire and operate street railways run by electricity or other motive power. The consolidation of the new company with the Greenville, Spartanburg and Anderson Railway Company and with any other railway company chartered in any other state through or near which the Piedmont and Northern proposed to pass, was authorized.

Exhibit 8 before the Commission is an amendment to the charter of the Piedmont and Northern Railway Company by Special Act of the Legislature of South Carolina, approved January 27, 1927, under which the restriction prohibiting construction in any County, un-

less commenced within ten years from March 1, 1911, was removed.

Exhibit 9 before the Commission is traffic contract between the Piedmont Traction Company and Greenville, Spartanburg and Anderson Railway Company and the S. A. L. Railway Company, dated December 9, 1910; this contract specifies that at the time it was the purpose of the Piedmont Traction Company and the G. S. and A. Railway, or their owners, to construct a line from Greenwood to Durham and through intermediate points.

Exhibit 10 before the Commission is contract between Southern Railway and G. S. and A. Railway Company, dated October 10, 1913, in reference to a crossing, and states that the G. S. and A. proposes building and operating a line of electric railway from Greenwood, S. C., to Durham, N. C.

Exhibit 11 before the Commission is contract between G. S. and A. and Southern Railway, dated March 25, 1913, in reference to an underpass, and states that the G. S. and A. has located and under construction an (108) electric railroad from Greenwood to Durham.

Exhibit 12 before the Commission is contract between Piedmont Traction Company and Southern Railway, dated February 5, 1913, in reference to an underpass at Gastonia, and refers to the double track line of electric railway, with appurtenant trolley wires and superstructure which the Piedmont Traction Company has located and under construction, to extend from King's Mountain to Mt. Holly, North Carolina.

Exhibit 13 before the Commission is contract between Southern Railway and P. and N. Railway, dated November 12, 1914, in reference to a crossing at Greenville, S. C., and states "whereas the main track of the Piedmont Company running between Greenwood, S. C., and Durham, N. C."

Exhibit 14 before the Commission is mortgage, given by Piedmont and Northern Railway Company to Farmers' Loan and Trust Company, dated July 1, 1914. At the time this mortgage was executed the existing lines of the P. and N. had been constructed and put in operation; the mortgage covers the existing lines and any which might be thereafter acquired by purchase or con-

struction, and was drawn to cover the lines then built and the ones contemplated to be built; the mortgage secures fifty million dollars of bonds to provide sufficient funds for the entire line; ten million dollars could be taken down at that time against existing lines, and the remaining $40,000,000 issued as other lines were constructed.

The section of the road between Gastonia and Charlotte was completed and put in operation in July, 1912; the section between Greenwood and Greenville in Novem-
(109) ber, 1913; and between Greenville and Spartanburg in April, 1914. The interests controlling the Piedmont and Northern have recently bought the Greensboro, High Point and Salisbury street railway systems.

The plan to construct the line through was suspended because it was not good business to endeavor to sell securities under existing conditions; the plan was merely suspended, but has never been abandoned.

Following the outbreak of the War, he and his associates continued to watch the situation and give consideration to the plans to complete the construction of the railroad as originally designed; in 1916 steps looking to further construction work were taken in spite of the war situation; surveys and locations were made in 1916; engineers were put on for final location of parts of the road from Gastonia South and also in making surveys for getting out of Charlotte to the North. In 1916 final location between Gastonia and Kings Mountain was made, which is approximately the location now proposed to be used; surveys were made but no final location decided upon between Kings Mountain and Spartanburg; about 1911 a great deal of property had been acquired in Spartanburg for giving an outlet for the road Northward toward Gastonia, and a route was decided upon; practically all of this property has been retained, except a small amount sold to the Southern Railway for double tracking. The exit north from Spartanburg now proposed to be used is the same one which was decided upon at that time. It is proposed to go out of Charlotte northward on the location selected in 1916.

(110) Prior to 1916 he made an investigation for getting into Winston-Salem .

Following the surveys of 1916 it was practically impossible to complete any project requiring the selling of

securities, except to sell them at cut-throat prices. The Piedmont and Northern Railway lines were taken under Federal Control and continued under that control until March, 1920. After Federal Control was removed the physical condition of the road was in bad shape. The financial market was in bad condition and it was not thought prudent to go ahead with the project. From time to time it was thought that construction could be resumed in just a few months, but it was not until the latter part of 1923 or April, 1924, that it was definitely felt that the financial market was getting in such shape to go ahead with the work. At that time further surveys and examinations were begun. Mr. Duke died in October, 1925, and at that time and for eighteen months prior to his death engineers had been in the field making surveys; locations North of Charlotte had been made and just prior to Mr. Duke's death the matter was practically ready to be proceeded with. His death delayed actual construction work and it was thought better to defer the building of the Piedmont and Northern for a short time until matters connected with his companies could be adjusted.

CROSS EXAMINATION.

The Power Company has twelve hydroelectric plants on the Catawba River, which, together with its steam plants, develop about 800,000 horsepower. The Buck station has 100,000 horsepower; we contemplate build-
(111) ing three more large plants of the size of the Buck; these three, together with the Buck, will handle ten or eleven thousand tons of coal per day. The Power Company owns 16 power plants; each of the steam plants of the size of the Duke plant consumes approximately from 2,000 to 3,000 tons a day; the construction of these plants produces quite a tonnage of freight, but after the plant is built the principal tonnage is coal going to supply it.

Southern Public Utilities Company is owned by the Duke Power Company and is a retail power, gas and street railway company operating in North and South Carolina, and owns property at Anderson, Greenville, Greer, Chester and Ft. Lawn, S. C., and Charlotte, Bessemer City, Reidsville and Hickory, N. C., not including

the properties recently purchased at Burlington, Greensboro, High Point, Hendersonville and Salisbury, N. C., and Spartanburg, S. C. These plants consume many cars of tonnage per day.

The Mill Power Supply Company, owned by the Duke Power Company, is a purchasing company for the different interests of the Power Company; its capital is $25,000, and it is located at Charlotte; it carries a comparatively small amount of goods; in most cases it controls the freight traffic on the goods purchased. The Tuckaseege Spinning Company is a small mill at Mt. Holly, bought in order to secure water rights and is owned by the Power Company; the P. and N. gets its traffic. The superior Yarn Mills is located on the Catawba River near Statesville and was purchased to secure water rights, and is not on the P. & N.

The Duke Power Company owns the Western Carolina Power Company, which latter company owns the Bridgewater Development.

(112) The Duke Endowment owns no stock in the Piedmont and Northern, and if any comes to it, it will come from the residue of Mr. Duke's estate. The American Hardware and Equipment Company, located at Charlotte, is a wholesale hardware and equipment company shipping over the different roads leading out from Charlotte; the Duke Power Company owns a majority of its stock.

The Duke Power Company owns 10,000 shares of stock in the Piedmont and Northern; and the Duke Farms Company 38,320 shares; the capital stock of the P. and N. is about 84,000; those two companies own the controlling shares.

The Duke Power Company owns a set of buildings in Charlotte; they are not warehouses, but are rented to the public for a monthly rental; there is no traffic agreement with the tenants. The Power Company supplies power to possibly 300 cotton mills and enters into a contract with each of these mills; the rates, as well as the form of contract, are approved by the State Corporation Commission.

The Trustees of the Duke Endowment have the right to sell all of the properties owned by it.

The Duke Power Company is controlled by the Duke Endowment, therefore, all of the Power Companies are

controlled by the Duke Endowment. All of the proceeds, except 20 per cent, go back for investment in the Power Company until the Duke Endowment has doubled the corpus of the trust.

The entire stockholdings of the Duke Endowment, as of May 23, 1927, are 102,000 shares of preferred stock of Aluminum Company of America; 326,026 shares of Duke Power Company; and 7,935 shares of Judson Mills.

(113) As of May 31, 1927, the Duke Power Company owned stock as follows: Western Carolina Power Company, 36,690 shares; Southern Power Company, 53,591; Great Falls Power Company 56,112 preferred; 141,844.53 common; Wateree Power Company, 155,316; Southern Public Utilities Company, 108,228; P. and N. Railway Company, 10,000; Mill Power Supply Company, 250; Mercantile Development Company, 1,590; Superior Yarn Mills, 5,000; Tuckaseege Spinning Company, 5,000; Carolina Standard Gas Products Company, 1,000; Republic Cotton Mills, 15,412; Judson Mills, 882.

The contract I put in evidence between the Seaboard Air Line and the Greenville, Spartanburg & Anderson Railway, which afterward became the P. and N. was a traffic agreement. By that contract I think we agreed to give the Seaboard our through freight. The 40 per cent, however, did not apply to all traffic from everywhere or anywhere. It applies on certain gateways.

In the past few months our representatives have gone to Salisbury and other points which will be touched by the P. & N. if extended and got a large number of people to sign an agreement that they would give 50 per cent of their freight to the P. & N.

The resolution of the Board of Directors of November, 1926, calling a meeting of the stockholders on December 8th, was the first time that this construction was authorized by the stockholders or Board of Directors, meaning the lines between Spartanburg and Gastonia and between Charlotte and Winston-Salem.

The Directors of the Piedmont and Northern Railway Company and some of their affiliations are as follows:

(114) G. G. Allen, Chairman of the Duke Endowment and President of the Southern Power Company;

C. C. Armstrong, President of several mills in Gastonia and surrounding territory, Rock Hill and various points; these mills are undoubtedly considerable shippers of freight;

J. W. Arrington, President Union Bleachery at Greenville, S. C.; a large bleaching and finishing plant that produces a large amount of freight.

W. E. Beatty, who up to a few years ago was President of the Parker chain of mills, which are large shippers over the Piedmont and Northern and other roads;

L. D. Blake, interested in the management of mills at Belton, S. C., which are large shippers over the Piedmont and Northern;

B. E. Geer, President of Judson Mills at Greenville, and interested in some other mills which are large shippers; he is also one of the Trustees of the Duke Endowment;

C. A. Cannon, President of the Cannon chain of mills, which are the largest producers of towels in the world, and which chain of mills produces a large amount of traffic;

B. B. Gossett, head of mills at Charlotte, N. C., and Anderson, which produce a large amount of traffic;

J. P. Gossett, President of the Williamston Mills and large mills at Anderson, S. C., which produce a large amount of traffic.

E. F. Green, President of Lockwood Green Company, and head of large mill interests in South Carolina, which produce a large amount of traffic;

(115) C. E. Hutchison, head of mills at Mt. Holly, which produce a large amount of traffic;

J. A. Law, who is interested in the management of certain mills that produce a large amount of traffic;

W. S. Lee of Charlotte, N. C., member of Board of Trustees of Duke Endowment, Vice-President and Chief Engineer of the Southern Power Company, and President of the Piedmont and Northern Railway;

R. E. Ligon, interested in the management of mills at Anderson, S. C., which are large shippers, and his management is such that he can undoubtedly influence their traffic;

V. M. Montgomery, President of large mill interests in South Carolina, who can control traffic from these mills, and they ship a lot of freight;

W. S. Montgomery, President of mills at Spartanburg, S. C., and he can control a large amount of freight, and those mills have a large amount of freight;

A. F. McKissick, mill owner and President of Chamber of Commerce at Greenville, S. C.;

J. C. Self, President of large mill interests at Greenwood and adjacent points; he controls a large amount of freight naturally;

J. H. Sparks, President of a chain of fine yarn mills in and around Gastonia; he controls a large amount of traffic and freight;

A. W. Smith, President of large mill interests at Greenville, S. C.;

E. A. Smyth, interested in cotton mills; his principal interest now being in mills near Flat Rock and at Hendersonville, N. C.;

(116) J. T. Woodside, a large mill owner, and controls large amounts of freight;

Stewart W. Cramer, who is a very large mill owner; President of a mill not located on line of Piedmont and Northern;

J. T. Collins, Philadelphia, Pa.

RE-DIRECT EXAMINATION.

Exhibit 20 before the Commission is copy of resolution passed by the Board of Directors November 3, 1926. The meeting of the stockholders was held December 8, 1926, and the Directors were given authority to go ahead with this construction work; at a subsequent meeting of the Directors, authority was given to apply to the Interstate Commerce Commission for a Certificate of Public Convenience and Necessity, if such certificate was deemed to be necessary. From the inception of the road and from time to time the matter of proceeding with construction work had been discussed among the officers and directors, and it had not been considered necessary to get actual authority from the stockholders to proceed until we were ready to proceed.

None of the power contracts of the Southern Power Company have ever referred to the P. & N. Railway; prior to the building of the railroad along the route built, and also along the route projected, we were urged by many people to build the road, and it was thought

reasonable to see if they were serious about the matter and we asked them to sign a contract to give us a part of the business, which in most cases they very willingly did.

It is contemplated that bonds will be issued under the mortgage of 1914, which provided for fifty million dollars of bonds to pay for the proposed construction. (117) When the Duke Endowment was formed, Mr. Duke did not give the Endowment any money, but he put in it 100,000 shares of the stock of the British American Tobacco Company; 75,000 shares of the R. J. Reynolds Tobacco Company; 5,000 shares of the George W. Helme Company. These stocks were sold by the Endowment and the proceeds disbursed under the terms of this Indenture; Six Million Dollars of the proceeds were used for buildings at Duke University.

The list, introduced as Exhibit 64 before the Commission, is as follows: Stocks of Mills Along Lines of Southern Power Company, Owned by J. B. Duke, between January 1, 1905, and October 10, 1925,—Alpine Cotton Mills, Morganton, N. C., 150 shares; Amazon Cotton Mills, Thomasville, N. C., Par $10.00, 4,000; Acme Spinning Company, Greenville, S. C., 75; Anderson Cotton Mills Anderson, S. C., 250; Aragon Cotton Mills, Rock Hill, S. C., 250; Brandon Mills, Greenville, S. C., 250; Chadwick Hoskins Co., Charlotte, N. C., 250; Chiquola Mfg. Co., Honea Path, S. C., 519; Clifton Mfg. Co., Clifton, S. C., 100; Decotah Cotton Mills, Lexington, N. C., 400; Dunean Mills, Greenville, S. C., 250; Durham Cotton Mfg. Co., East Durham, N. C., 298; Durham Hosiery Mills, Durham, N. C., 150; Easley Cotton Mills, Greenville, S. C., 205; Erwin Cotton Mills, Durham, N. C., 5,206; Groves Mills, Gastonia, N. C., 750; Inverness Mills Co., Winston-Salem, N. C., 100; Jewell Cotton Mills, Thomasville, N. C., 50; Judson Mills, Greenville, S. C., 7,935; Locke Cotton Mills, Concord, N. C., 2,550; Cramerton Mills, Cramerton, N. C., 300; Loray Mills, Gastonia, N. C., 172; Mooresville Cotton Mills, Moores- (118) ville, N. C., 250; Orr Cotton Mills, Anderson, S. C., 298; Pearl Cotton Mills, Durham, N. C., 850; Pickett Cotton Mills, High Point, N. C., 150; F. W. Poo Mfg. Co., Greenvlile, S. C., 400; Pomona Mills, Greensboro, N. C., 122; Proximity Mfg. Co., Greensboro, N. C., 217;

Republic Cotton Mills, Great Falls, S. C., 12,325; Rhodhiss Mills, Rhodhiss, N. C., 1,000; Union Bleachery, Greenville, S. C., 1,040; Victor Monaghan Co., Greenville, S. C., 160; Woodside Cotton Mills, Greenville, S. C., 113.

The engineers were instructed to tie the projected line in with the street car line at Winston-Salem; this location was not absolutely final; it was definitely determined to go around or through Winston-Salem and connect with the Norfolk and Western; no definite arrangements have been made with reference to terminals at Winston-Salem. The line will go through Salisbury, but its exact location through the city had not been determined; when the survey was being made negotiations were pending for the purchase of the street railway properties in Salisbury and since that time these properties have been purchased.

Exhibit 110 before the Commission, introduced by Southern Railway Company, is a certified copy of stocks, bonds, etc., belonging to the estate of Jas. B. Duke, deceased, as of June 10, 1927, being Schedule E of the inventory of said estate. This exhibits shows, among others, the following stocks owned by the Duke Estate:

| | No. Shares | Valued at |
|---|---|---|
| Duke Farms Company | 8,320 | $13,875,929.60 |
| Duke Powder Company | 125,904 | 12,590,400.00 |
| Hunter Mfg. & Com. Co., | 4,023 | 402,300.00 |
| Carolina, C. & O. Ry., | 7,000 | 547,750.00 |
| British-Am. Tob. Co., Ltd., | 99,433 | 2,510,683.25 |

| (119) | No. Shares | Valued at |
|---|---|---|
| American Snuff Company | 500 | $ 72,875.00 |
| Alpine Cotton Mills | 150 | 15,000.00 |
| American Spinning Company | 75 | 18,375.00 |
| Am. Hdwe. & Equipment Co., | 600 | 54,900.00 |
| Decotah Cotton Mills, | 400 | 48,000.00 |
| Durham Cotton Mfg. Co., | 298 | 149,000.00 |
| Kerr Bleaching & Fin. Co., | 56 | 12,656.00 |
| Buchanon Investment Corp., | 1,000 | 13,086,149.00 |
| Locke Cotton Mills, | 2,120 | 245,495.00 |
| Pearl Cotton Mills | 750 | 93,750.00 |
| O'Dell Mfg. Company, | 100 | ..... |
| Piedmont Elec. Chem. Co., | 315 | ..... |

| | | |
|---|---|---|
| Rhodhiss Mills Co., | 968 | 121,000.00 |
| Stevens Company, | 375 | 41,250.00 |
| Union Bleachery Co., | 520 (Preferred) | 54,080.00 |
| Union Bleachery Co., | 520 (Common) | 78,000.00 |
| American Machine & Foun. Co., | 3,153 | 606,952.50 |
| Liggett & Myers Tob. Co., | 38,280 | 2,869,324.00 |
| R. J. Reynolds Tob. Co., | 106,600 | 9,981,475.00 |
| Texas Company, | 35,997 | 1,768,352.63 |
| Tobacco Products Corp., | 6,600 | 684,750.00 |
| United States Tob. Co., | 22,397 | 1,287,827.50 |

This exhibit shows that of the various cotton mills stock owned by Mr. Duke between January 1, 1905, and October 10, 1925 (the date of his death), shown on Exhibit 64 before the Commission, all had been disposed of prior to his death except the following:

Alpine Cotton Mills, Morganton, N. C.; 150 shares; American Spinning Company, Greenville, S. C., 75 shares; American Hardware & Equipment Company, Charlotte, N. C., 600 shares; Decotah Cotton Mills, Lexington, N. C., 400 shares; Kerr Bleaching Company, Concord. N. C., 56 shares; Locke Cotton Mills, Concord, N. C., 2,120 shares; Pearl Cotton Mills, Durham, N. C., 750 shares; Rhodhiss Mills, Rhodhiss, N. C., 968 shares; Union Bleachery Company, Greenville, S. C., 1,040 shares.

None of the stocks purchased by the Power Company were purchased for the purpose of influencing traffic to the P. & N.; he was familiar with some of Mr. Duke's purchases of stock in these industries as many (120) people asked him to get Mr. Duke to take the stock; as far as these stocks were concerned he never heard any mention made in connection with the P. & N. Railroad, or of influencing traffic to it. The Duke Endowment owns a large block of stock in the Judson Mills; this was not acquired for the purpose of influencing traffic to the P. & N.; negotiations for the sale of this stock have been under way for some months, and it is apt to be sold any day.

The warehouses owned by the Duke Power Company are on First Street in Charlotte and cost about

$140,000; their rentals amount to 14.05 per cent of the investment. The property referred to as warehouses owned by the Mercantile Development Company is the building containing the general offices of the Power Company, and also containing warehouses; the Duke Power Company owns 50 per cent of the stock in the Mercantile Development Company and it earns about 12 per cent on the investment; the other 50 per cent is owned by the Latta Estate, which has no connection with the P. & N.

The Commission introduced as its Exhibit 12 certificate of incorporation of the Piedmont Traction Company, dated January 6, 1910, showing that the company was incorporated under the laws of North Carolina; that it was given authority to purchase, construct and operate by electricity or other power street railways for the transportation of passengers, mail, express, merchandise or other freight to operate in the State of North Carolina, and it is provided that no street railway line shall extend more than 50 miles in either direction from the home office of the Company, which is at Gastonia.

(121) The Commission introduced as its Exhibit 13 charter of the Greenville, Spartanburg and Anderson Railway Company. This charter was granted March 10, 1910; principal place of business is at Greenville, S. C. The Company was given the right to acquire by purchase or otherwise and to exercise all rights and use all property formerly of Anderson Traction Company, a corporation organized unde the laws of the State of South Carolina; to purchase or construct and operate by electricity or other motive power other than steam, a street railway system or systems for transportation of passengers, mail, express, merchandise or other freight in the counties hereafter named; to lay tracks and transact business over highways, roads, streets, avenues, etc., under franchises or permits granted by the proper authorities. "The termini of the street railway or street railway system proposed to be constructed are, and the route thereof is, as follows:" Beginning at the City of Anderson and running to Greenville via Belton, Williamston, Pelzer and Piedmont; from the City of Greenville to Spartanburg; the total length of the main line track of said street railway system is about 65 miles. The right is also given to extend the line to any point or points in the vicinity thereof whenever it may be deemed

advisable; it is given the right to sell, lease or otherwise dispose of all or any portion of its tracks, lines, properties, etc., to any other corporation organized under the laws of this state or any other state; to purchase or acquire all or any portion of the lines and other properties in or out of this state of any corporation transacting any business that this corporation is empowered to transact; to merge and consolidate with any corporation of this (122) state having generally similar purposes. The incorporators are J. B. Duke, B. N. Duke, W. S. Lee, E. A. Smythe, L. W. Parker, W. J. Thackston and H. J. Haynsworth.

The Commission introduced as its Exhibit 14, Piedmont Syndicate Agreement, dated January 10, 1911, being the same as Exhibit 6 before the Commission, which Exhibit 6 is hereinbefore referred to and described in the statement of Exhibits 7, 8 and 9 in this case, said last named exhibits being the testimony of W. S. Lee before the Commission which was introduced in this case.

The Commission introduced as its Exhibit 15, the Act of the General Assembly of the State of South Carolina, in corporating the Piedmont and Northern Railway Company, approved February 24, 1911, in substance as follows:

The incorporators are J. B. Duke, B. N. Duke, Samuel McRoberts, W. S. Lee, E. A. Smythe and L. W. Parker. The corporation is authorized to construct, maintain and operate a line or lines of railway to be operated by electricity or other motive power, beginning at some point in York County on the North Carolina line, extending through York, Cherokee, Spartanburg, Greenville, Anderson, Abbeville, and Greenwood Counties, or any of them, and to the Georgia state line. Also the authority to build and operate lines connecting with said main line through the Counties of Union, Laurens, Saluda, Lexington, Newberry, Richland, Chester, or such of them as may be determined upon, and in such other counties of the State as may be selected by the corporation. The right is given to change the *guage* of its tracks, cross streets, highways, cross at grade or over or under other railways. It may operate along its right-of-

way and extend into the villages, towns and cities through which it passes, lines of railway, telephone, telegraph and electric power transmission, and shall be entitled to charge and collect fares and tolls for all messages and for power furnished, provided, that unless the corporation shall enter and begin actual construction of its lines in any county in which it is empowered to enter, either expressly or under the general clause of (123) this Act within ten years from March 1, 1911, all rights and franchises given to enter such county shall expire. Right is given to construct, purchase or acquire and operate the street railways run by electricity or other improved motive power through cities and towns, provided a franchise or consent from the municipal authorities is obtained. Authority is given to purchase or otherwise acquire the railway or other property of any railroad company or street railway company. The corporation is given the power to purchase, lease, or otherwise acquire the railway franchises, etc., of any other railroad company or street railway company in this or any other state. Right of eminent domain is given. It is authorized to do the business of carrying passengers, mail, express, merchandise and other freight. It is also given all rights and privileges given to railroad corporations and street railway corporations under and by virtue of the general statutes of the State of South Carolina; it is authorized to consolidate and merge the property of the Greenville, Spartanburg and Anderson Railway Company with the Piedmont and Northern Railway Company; authorized to merge and consolidate with any company now or hereafter formed having, or authorized to have, lines of railway in any of the towns or counties of this or any other State, through or near which said P. and N. Railway Company passes or proposes to pass with its lines.

The Commission introduced as its Exhibit 16, the amendment to the charter of the Piedmont and Northern Railway Company, approved January 27, 1927, which amendment removes the restrictions from the original charter in reference to the completion of the (124) lines of the Company within ten years and also provides that the rights and privileges granted may be exercised in any other state to the extent and in the manner prescribed by the laws of such state.

The Commission introduced as its Exhibit 17 agreement dated December 9, 1910, between the Seaboard Air Line Railway Company and the Piedmont Traction Company and the Greenville, Spartanburg and Anderson Railway Company, which two latter companies are referred to as "the Companies". The contract recites that the Companies propose to construct a standard gauge railway to be operated as a common carrier of freight and passengers and to use steam, electricity, gasoline or other motive power over the following routes: Route A—From Charlotte through Mount Holly and Gastonia to Kings Mountain; Route B—From Spartanburg through Greenville to a connection with the Seaboard Air Line at Calhoun Falls, Abbeville or Greenwood, and a line from Belton to Anderson; Route C—The line to extend from a connection with Route B at Spartanburg to a connection with Route A at Kings Mountain; Route D—A line from Charlotte through Greensboro to a connection with the S. A. L. at or near Durham. The contract makes each road the preferred connection of the other and provides for freight transportation division, as therein set out.

The Commission introduced as its Exhibit 28, certified copy of resolution adopted at a special meeting of the Board of Directors of the P. and N. Railway, November 3, 1926, authorizing the extension of its main lines, as follows:

WHEREAS, the late James B. Duke and his associates, in organizing the Piedmont and Northern Railway Company, intended that its main line of railway should (125) extend through the Piedmont Section of the Carolinas from Greenwood, S. C., to Durham, N. C., with such additional lines as might be necessary or desirable for the development of the resources of this section; and,

WHEREAS, the existing lines of railway of the Company were constructed as a part of such project, with the aim and desire on the part of Mr. Duke and the other officers and directors of the corporation, that further extensions would be made from time to time so as to carry out the original plan of making the Pied-

mont and Northern Railway Company a potent factor in the continued industrial development of this section; and,

WHEREAS, to refer briefly to the history of the Company and to circumstances which for some time have required the postponement of plans for further construction: The North Carolina link between Gastonia and Charlotte was completed in July, 1912; the South Carolina link between Greenwood and Greenville in November, 1913; and the link between Greenville and Spartanburg in April, 1914. In the Summer of 1914 the World War came on, causing a general suspension of railroad construction throughout the country; then followed Federal Control of railroads, which continued until the early part of 1920. Upon the termintaion of Federal Control the physical property of the Company had to be rehabilitated and its business re-established. This required several years of effort and a large expenditure of money before plans for further construction could be resumed, so that it was not until shortly before Mr. Duke's death, which occurred on October 10, 1925, that he and the directors of the corporation were again able to take up plans for the completion of the road. In (126) the summer of 1925 engineering parties were put into the field to make surveys for further extensions, and interest in favor of the completion of the road became general throughout this section. Mr. Duke continued actively engaged upon the plans for the completion of the road up to the time of his death, and since his death the work of completing the preliminary plans up to the point where construction work could be resumed has been continued as rapidly as the circumstances brought about by the death of Mr. Duke would permit; and,

WHEREAS, these plans have now been completed to the point where further construction work may be commenced;

NOW, THEREFORE, BE IT RESOLVED, that a special meeting of the stockholders of the corporation be, and the same hereby is, called to be held at the office of the Company in Greenville, S. C., on Wednesday, December 8, 1926, at two o'clock P. M., to consider the

following and such other business as may properly come before said meeting in connection therewith, and to take such action thereon as may be deemed desirable or advisable.

1. That the Board of Directors of the corporation be given authority to construct, or cause to be constructed, or otherwise to provide for such extensions and additions to the existing lines of railway of the corporation as will connect the line of railway in the State of South Carolina extending from Greenwood to Spartanburg with the line of railway in the State of North Carolina, extending from Gastonia to Charlotte; and that the Board of Directors also be given authority to cause to be constructed, or otherwise to provide for the extension of the existing line of railroad in the State of North (127) Carolina from Charlotte in a Northerly direction to such points as the Board of Directors may deem advisable, with the authority ultimately to extend said line of railway to Durham, North Carolina, along such route and with such branch lines as the Board of Directors may select, and to do all such acts and enter into all such contracts and agreements as they may deem to be necessary or advisable in order to provide for such extensions and additions.

2. That Section 2 of the charter of the corporation as contained in Act No. 214 of the General Assembly of the State of South Carolina of 1911 be amended so as to read as follows: "Section 2. That the said railway company is authorized to construct, maintain and operate a line or lines of railway, with one or more tracks, to be operated by electricity or other motive power, beginning at some point on the North Carolina line, and extending thence into, across or through the following counties: York, Cherokee, Spartanburg, Greenville, Anderson, Asheville, and Greenwood, or any of them, and by or through the villages, towns and cities situate in said counties, or any of them, and to the Georgia State line. That said railway company is further authorized to build, construct, maintain and operate its main line of railway, and other lines of railway connecting therewith, into, across or through such other counties and to such other points in this State and into, across or through

such other State or States as may be selected by said corporation. And said company is authorized to construct and maintain such sidetracks, turnouts, switches, industrial tracks and such other operating appliances and structures as may be found convenient. And for this purpose it shall have the right and power, from (128) time to time to change the gauge of its tracks and to cross roads, streets and highways, and to construct and maintain culverts, trestles and bridges over and across the streams and water courses in its route, providing that in crossing any navigable stream or water course, said corporation shall provide draw bridges for the convenience of boats navigating the same. And said corporation shall have the right to cross, at grade, over or under any other railroad or railway now constructed, or that may hereafter be constructed, subject to the laws, rules and regulations with respect to same. And said corporation shall have the rights and power to erect and maintain such depots, stations, warehouses, elevators, compresses, wharves, docks, yards and terminals, and other necessary and convenient establishments and structures along or near its line of railway for the accommodation of passengers and freight, and shall be entitled to charge and collect reasonable compensation for storage, dockage, wharfage, lighterage and all labor and services incident thereto, and that said corporation shall have the right and power, in connection with its railway, or otherwise, to own, operate, or make traffic arrangements and agreements with one or more lines of steamboats, ferries, ferry boats, or other vessels for the transportation of passengers and freight, and may charge and collect reasonable fares and tolls therefor. And it may construct, maintain and operate along its right-of-way and extending into the villages, towns and cities through or near which it may pass, lines of railway, telephone, telegraph, and electric power transmission, with all suitable poles, towers, fastenings and appliances therefor, and shall be entitled to charge and collect reasonable (129) fares and tolls for all messages and for power furnished; Provided, however, that said corporation shall not be entitled to extend said lines along the streets of any village, town or city of this State without first securing the consent of the municipal authorities.

3. That Section 6 of said charter be amended by changing the period at the end of said section to a semi-colon and adding after said semi-colon the following: "and may be exercised in any other State to the extent and in the manner prescribed by the laws of such State."

4. That Section 9 of said charter as heretofore amended under the provisions of the general statutes of the State of South Carolina be further amended so as to read as follows: "Sec. 9. That the amount of the total authorized capital stock of the corporation shall be Two Hundred Thousand (200,000) shares to consist of common or preferred shares, or partly of each, as may be determined upon by said corporation; that the common shares of said capital stock shall have no nominal or par value and may be issued by the corporation from time to time, in such amounts and for such consideration and upon such terms and conditions as the Board of Directors may deem advisable; that the preferred shares of said capital stock shall be of the par value of One Hundred ($100) Dollars each, and may be issued by the corporation from time to time, and in such amounts as the Board of Directors may see fit, and with such preferences, conditions and limitations as may be prescribed by the Board of Directors; that whenever the capital stock of the corporation is increased by the issuance of additional capital stock without nominal or par value, (130) or of preferred stock, the stockholders of record at the time of such increase shall be given the preference of taking such increase in proportion to the amount of stock then owned by them, as such ownership may appear from the records of the corporation:

"Provided, that said corporation may from time to time, and as often as may be deemed advisable, increase its authorized capital stock, or amend its charter in other particulars upon a vote of the stockholders in the manner and form prescribed by the general statutes of the State of South Carolina, and all amendments and acts supplemental thereto, upon the payment to the State of the fees prescribed by law."

5. To authorize such other amendments to the charter of the corporation, or make such changes and modi-

fications in the proposed amendments, as hereinbefore set forth, as may be deemed desirable or advisable.

The Secretary of the corporation is hereby directed to give the stockholders of the Company of record on this date thirty (30) days' notice of the special meeting to be held as hereinabove specified.

The Commission introduced as its Exhibit 29, list of the holders of stock of the Piedmont and Northern Railway Company, as of March 2, 1927, showing 486 stockholders in addition to the Duke Power Company and Duke Endowment.

The Commission introduced as its Exhibit 37, testimony of MR. EDGAR THOMASON on the hearing before the Interstate Commerce Commission, in substance, as follows:

That he was in charge of the operations of the Company and had been connected with it since 1911 as (131) Treasurer. In 1911 Mr. Duke informed witness that he and his associates were to build a railroad from Greenwood to Durham and requested him to make a report on some preliminary work. Mr. Duke said that considerable information regarding traffic, operating conditions, etc., had been gotten together and he turned it over to Mr. Thomason, including estimates of construction costs, prospective traffic, etc.,; among the data was a contract dated December 9, 1910, with the S. A. L. Railway. Mr. Duke told him at the time that the first links to be constructed in the Greenwood-Durham line were to be between Charlotte and Kings Mountain and between Greenwood, Anderson and Greenville, and that the matter of completing the line would be taken up later.

The original property was the Anderson Traction Company, an interurban line eleven miles in length running from Anderson, S. C., to Belton, S. C., and before he came to the property the Anderson Traction Company had been taken over by the Greenville, Spartanburg and Anderson Railway. About March 10, 1911, he attended a meeting of the Piedmont Syndicate in New York and the matter of constructing the line from Green-

wood to Durham was discussed and it was definitely decided to proceed with the construction. The Piedmont and Northern Railway Company had been formed on February 24, 1911, to take over the Piedmont Traction Company and the Greenville, Spartanburg and Anderson Railway, and to complete the through line to Durham. The plan adopted was to construct the road in sections under separate contracts for the various sections. The first section to be constructed at the South was between Greenville and Greenwood, for which contract was let on (132) March 20, 1911, and work was promptly begun; at about the same time contract was let for construction of a line from Charlotte to Kings Mountain; the next step was to contract for the portion between Greenville and Spartanburg, contracts for which were made in July, 1912. The line from Charlotte to Gastonia was placed in operation in July, 1912; from Greenwood to Greenville in November, 1913, and from Greenville to Spartanburg in April, 1914. While this last work was being done the matter of connecting Spartanburg and Gastonia was taken up. Preliminary work was under way and the plan was to proceed promptly North of Spartanburg. Before contracts were made and the work begun, the War broke out in July and all work was temporarily suspended; study and consideration of the matter was continued and early in 1916 considerable engineering work was done and a location determined upon between Gastonia and Spartanburg. This location was shown by blueprints prepared at the time. Construction work was not continued at that time because, as a result of the War, conditions had become serious in the United States. The Government was discouraging new work; by the fall of 1916 it was out of the question to continue or go ahead with the building; in April the country entered the War, then came Federal Control which tied up everything until 1920. During 1916 considerable work was done looking to letting contracts for the work. When the property was turned back to its owners by the Government on March 1, 1920, it was not in satisfactory operating condition, and the first task was to rehabilitate it. During Federal Control serious disruption had taken place in the traffic arrangements and routings so that when the property was returned there was a serious (133) falling off in traffic; it was necessary to read-

just traffic arrangements in order to get back the traffic that had been diverted from the property. However, the matter of resumption of construction was considered, in fact it had continuous consideration in the light of prevailing conditions down to the time when recently it was determined to go ahead. The War had brought about a substantial change in wage levels and material prices; prices had advanced materially and particularly so in relation to traffic and earnings of the property; no one knew how long the high prices would continue, for which reason resumption of the work was deferred; final decision to go ahead was not arrived at until some time in 1925 when it was thought that price levels had become reasonably well stabilized and there was no reason to expect that levels would go back to where they were before the War. In the meantime the property had been rehabilitated physically and its traffic recovered.

In 1920 Mr. Duke said that his first task was to complete the line as originally projected. At no time was the project of building to Durham abandoned; on the contrary everybody connected with the property adhered to the plan to build the property through just as soon as conditions warranted. Mr. Thomason said that in 1911 the only portion of the line which had been constructed was the line from Belton to Anderson, which was being operated as a city and interurban line by the Anderson Traction Company, whose stock had been bought by the Greenville, Spartanburg and Anderson Railway Company, which had been incorporated to acquire or build a line between Greenville, Anderson and (134) Spartanburg. At that time there were street railway lines in Charlotte and Greenville and the stock in both these companies had been purchased by Mr. Duke and his associates; the Greenville Traction Company had been purchased by the Greenville, Spartanburg and Anderson Railway Company and was operated by it until 1913 when it was sold to the Southern Public Utilities Company so that the street railway properties in Greenville and Charlotte are not now owned by the Piedmont and Northern Railway Company, but that company has contracts giving it the right to use the properties of these two street railway companies in connection with

the operation of the through line of the Piedmont and Northern.

In April, 1915, a study was made of getting the line out of Charlotte to the North and the location then selected is the one now proposed to be used.

Under date of April 25, 1913, Mr. C. R. Capps, Vice-President of the Seaboard Air Line, wrote Mr. Thomason that the Norfolk-Southern Railway contemplated building a line into Charlotte which would cross the Piedmont and Northern's proposed line North and suggested that this would be an obstacle to the Piedmont and Northern in constructing its line North; on May 6, 1913, Mr. Thomason replied to Mr. Capps saying that he had made a survey of two or three lines leading north out of Charlotte, but had not settled on any one of them, said that he did not know at that time just when the matter would be taken up again. Early in 1924 Mr. Duke told Mr. Thomason to get the data together and authorized him to say that work would be resumed as soon as the road was gotten in shape and its traffic gotten back to what it had been.

(135) I have already stated that the matter of continuing the line north was always in mind and was frequently given special consideration. During November, 1923, I went over the proposed line running north from Charlotte with Mr. Duckett, who was then chief engineer of the Piedmont and Northern. I recall several conversations that I had with Mr. Duke regarding the resumption of the work in 1922 and 1923 and 1924. I remember telling Mr. Duke that the directors were agitating the matter of the resumption of the work. Mr. Lee and I were studying the situation. Early in 1924 Mr. Duke told me to get the data together as he thought the thing to do was to go ahead. He authorized me to say that we would go ahead as soon as we could get the road in shape and get its traffic back to what it was.

I especially recall that on a trip which I made with Mr. Duke through Virginia and West Virginia in May, 1924, visiting the coal mines there, the subject of the resumption of the work and the building of the line through to a connection with the Norfolk and Western at Winston-Salem was mentioned in a conversation with Mr. Jenks, vice-president of the Norfolk and Western. Mr. Duke stated that we were ready to go ahead and

asked whether the Norfolk and Western would cooperate. Mr. Jenks assured him that he would; that we would have the cordial support of that line if we built to Winston-Salem. The matter was mentioned time and time again.

(136) The matter of financing the proposed construction was taken up early in 1924 with bankers in New York, and the consideration of the financial aspects, as well as the matter of construction etc. have been carried on down to the present time.

The properties of the Winston-Salem Traction Company were bought by the Southern Public Utilities Company in 1913 and their use in entering the city by the Piedmont and Northern has always been contemplated. York and Cherokee Counties are mentioned in the Piedmont and Northern Railway charter as counties where it is authorized to construct a railroad; these counties lie North of Spartanburg and were included so that the line could be constructed North of Spartanburg. In September, 1910, the charter of the G. S. and A. was amended so as to permit its line to be constructed to the North Carolina State line; there was no point in going there except with the idea of going further North. When the contract was let to build from Gastonia to Charlotte, it provided for going on to Kings Mountain but later it was decided to temporarily stop at Gastonia.

The map in the Railway Guide of June, 1927, shows the line of the Piedmont and Northern projected to Durham. This map was inserted in the Railway Guide in 1916 and has been there ever since. It was put there because the line was projected to go to Durham; it was not intended to give the impression that the line would not go to Winston-Salem. The most important thing was to have it well known that the plans of the Company contemplated constructing through to a Northern connection. It was always in mind that the line would go to Winston-Salem and perhaps the Durham line would (137) connect at some point on the line to Winston-Salem.

He negotiated with the Winston-Salem Southbound to acquire trackage rights enabling the Piedmont and Northern to go to Winston-Salem over that line and if these rights could have been obtained the P. and N. would probably have abandoned the plan to build its own line

there, but the Southbound would not permit the use of that line. The Southbound is owned, one-half by the Norfolk and Western and one-half by the Atlantic Coast Line. The first letter was dated August 28, 1925, and stated:

"You have doubtless heard of the movement on foot by the people between Charlotte and Winston-Salem to get Mr. Duke interested in building an electric railway between those points, through the towns of Concord, Kannapolis, Salisbury and Lexington. If Mr. Duke should give favorable consideration to this question, the thought has occurred to me that instead of building a road between Lexington and Winston-Salem that some arrangement might be made with your company for joint usage of your road between Lexington and Winston-Salem and terminals at those points.

"If such an arrangement can be worked out, I feel it would be advantageous not only to the Winston-Salem Southbound, but to the Atlantic Coast Line and the Norfolk and Western."

The P. and N. proposed to buy a one-third interest in the Southbound. This was declined and the trackage contract was declined. The proposition was finally declined on February 18, 1927, as shown by the correspondence.

When the map was inserted in the Railway Guide the matter of trackage rights had not been taken up (138) with the Southbound.

Can't say when the line will be built to Durham; the policy of the Company has always been to build step by step. It was decided to go to Winston-Salem at the present time because the mileage North of Charlotte to a connection with a Northern line will handle not only general traffic but coal. The coal consumption in the Piedmont Section has steadily increased in recent years. It is certain, and particularly in view of the plans of the Power Companies to build large auxiliary steam plants, that coal consumption will increase very rapidly in the near future. As the coal tonnage, present and prospective, is increased, the desirability, from the standpoint of prompt service and economy, of shortening the route to the Virginia and West Virginia coal fields

as much as may be, has growing importance. The volume of general traffic moving between the Piedmont, North and West is also increasing rapidly.

In deciding upon the type and character of construction of the present mileage, weight was given to the expectation that the lines then to be constructed would become parts of the through line to a Northern connection. If it had been the plan not to connect Spartanburg and Gastonia, and not to build to a Northern connection, a more inexpensive type of construction would have been appropriate for the mileage now in operation; the same specifications for bridges were used as were used by the Southern Railway on its main line. If the line had been intended to be stopped at Spartanburg, much lighter locomotives would have been used than those now operated; when the P. and N. was built it was a higher class line than the Southern Railway main line (139) at that time. It had maximum grades of 1 per cent compensated for curvature at the rate of .04 feet per degree.

The property is electrically operated, as interurban properties customarily are operated. It ties into the street railway systems. Its passenger cars, locomotives and its motor cars are designed to operate where there is a high degree of curvature, as in cities. It makes frequent stops, averaging 1.2 miles a part, considering always the purpose of rendering the best local service. Its passenger cars are motivated by self contained motor units. The type of construction of the line is that of the standard interurban. Power is furnished by overhead trolley. The rails are bonded for return circuits. Cars and locomotives are so constructed as to operate over curves with a fifty foot radius, making it possible to make the right-angle city turns.

Passenger cars are lighted in series from the trolley; they are equipped with radial drawbars, enabling them to turn sharp curves and making them unacceptable on steam lines. Only its box cars and automobile cars are suitable for exchange with steam lines.

The personnel is similar to that on other interurban lines, such as motormen, conductors and electrical workers, and is largely recruited from street railway companies. Frequent passenger service is maintained over

all lines, there being stops at such frequent intervals as are appropriate in urban and interurban service.

Freight traffic is hauled by electric locomotives having various tonnage ratings, designed to serve local conditions, as they vary on different portions of the lines. These locomotives were purchased and are adapted for use only under the particular circumstances and condi-
(140) tions of traffic prevailing on applicant's property, or some similar interurban electric railway. The electric locomotives are unfit for a line with a long haul, heavy load traffic, such, for instance, as the Virginian Railway with its electric locomotives moving coal to Tidewater.

In the dispatching of trains, there is used a selector system designed for throwing the semaphore boards so that untrained men will not overlook their orders. Such operating practices are not in use by steam railroads.

The cars and locomotives of the company were specially designed for the particular interurban conditions that prevail on the property. A 1,500 d. c. voltage is used on the mileage between cities and at certain places in cities. The voltage in use by the street railways on the streets in the cities is about 600. There is a switch arrangement on all locomotives and cars, so that the voltage is reduced, as the immediate condition requires, from 1,500 to 750, which will operate over the 600 volt line. Such practice is followed in Charlotte, Greenville, Anderson and will be followed in Winston-Salem.

The applicant's project serves cities in which there are electric street railways operated by the Southern Public Utilities Company, a corporation controlled by the same interest which controls the applicant. These street railway systems are located in Charlotte, Winston-Salem, North Carolina, Greenville and Anderson, South Carolina, and over them applicant has trackage rights.

In the city of Gastonia, the applicant itself owns and operates the street railway system. The electric interurban railway of the applicant is the transportation fa-
(141) cility by which the street railway lines in these cities are connected with each other. The cars and locomotives that handle the traffic of the applicant at and through Charlotte and Gastonia operate over the street railway lines of those cities, and become in effect, street

railway facilities by virtue of the special design of cars and locomotives and the change of voltage.

Freight traffic is handled in cars that move through the streets of the cities and around the curves of a higher degree of curvature than those on which a standard railroad usually operates. While the locomotives are designed so that they can operate upon the city streets and handle freight traffic over the street car lines, it is not the thought to move the bulk of through freight traffic over the city street car lines. As a matter of convenience additional lines will be used in and around the cities to handle the bulk of such through freight. The urban operation in cities facilitates the interurban operation between the cities and the connections with the street railway lines affords important facilities for furnishing the most satisfactory local service. The street railway lines are used largely for delivery and pick-up service in the cities. The present manner of operations will be continued on the completed lines. Passenger traffic has shown a gradual decrease in relation to freight. This is very largely accounted for by the introduction of the automobile and the busses which operate over the splendid system of hard surface roads which have been constructed in North Carolina during recent years. It (142) is also due in part to the increase of freight traffic which has taken place during the period of decreasing passenger traffic. The proposed construction will increase very largely both the freight and passenger traffic. It should result in recovering back for the property heavy passenger traffic now hauled by the automobiles and busses. By the existing schedules it takes a minimum of three hours and twenty-seven minutes to go by rail from Winston-Salem to Charlotte; under our schedule the trip will be made in two hours and twenty minutes.

New industries will be constructed on the line and much new traffic will develop at all points. The Power Company has plans for a steam power plant between the Yadkin River and Winston-Salem, which will use approximately 3,000 to 3,600 tons of coal per day. A second plant is calculated to consume between 3,000 to 3,600 tons of coal per day. The average of coal cars is about 70 tons; they run up as high as 100 tons. The figures as to the quantity of coal to be used were given

by the Engineering Department of the Power Company. I believe the construction will benefit the Clinchfield and its shippers, and will open a new route for Clinchfield coal moving East from Spartanburg to points on the Piedmont line; will enable the Clinchfield to become a link in a very high class short line, efficient through route from the Piedmont Section to the Middle West. It will substantially increase the volume of coal consumed in the Piedmont and broaden the market for coal available to the Norfolk and Western producers in Virginia and West Virginia. It will open a new route to the North and West by the N. and W. into and through the Piedmont territory. It should be of great service to ship-
(143) pers because of improved service it will afford between the Piedmont Section and the N. and W. The Georgia and Florida comes into Augusta and is now building to Greenwood where it will naturally connect with our line; I think the officials of this road were correct in believing that it will derive great benefits from a connection with the P. and N. I would think this connection at Greenwood and the G. and F. would be greatly beneficial to the Clinchfield.

The securing of a connection with the P. and N. was one of the desirable features mentioned by the Commission in granting the application of the Georgia and Florida for its extension from Augusta to Greenwood. The construction will strengthen and benefit the S. A. L. with respect to its fuel supply and high class traffic moving from the Southeast to territory, say West of the Buffalo-Pittsburg line. I believe it will vastly improve the service and will shorten the time of shipments to and from the Central Freight Association territory via Spartanburg by one day, and via Winston-Salem by one or two days.

The P. and N. is dependent for an outlet upon the Southern, the Seaboard, Charleston and Western Carolina, and the Carolina, Clinchfield and Ohio, the railroads now seeking to prevent its expansion; these railroads compete locally with the Piedmont and Northern; a connection at Winston-Salem with the Norfolk and Western will make the Piedmont and Northern independent of these lines in reaching the outside world.

The strictly bridge traffic of the Piedmont and Northern is very light, approximately 2 per cent; it is

hoped that the proposed construction will increase this, (144) however, it is expected always to be of minor importance as compared with traffic which originates on or is destined to points on the Piedmont and Northern. In this respect it differs from the conditions on the main line of the Southern Railway through the Piedmont Section, which is the middle portion of a large system necessarily carrying bridge traffic very much in excess of the traffic which originates or is destined to points in this territory. This preponderance of bridge traffic necessarily affects the local service rendered on that mileage and prevents the same prompt and flexible service as is possible on the Piedmont and Northern with its relatively low percentage of bridge traffic.

It has been the opinion of the officials of the Piedmont and Northern that it was not necessary to apply to the Commission for a certificate of public convenience and necessity because it is an electric interurban railway not operated as a part of a steam railroad system, and because the construction had been begun prior to the time when the Transportation Act went into effect and the work is merely a resumption of the work theretofore begun. The Commission has never treated the Piedmont and Northern as subject to the Valuation Act; it is governed by the Commission's accounting rules governing electric railroads and not those governing steam railroads; the former Railroad Labor Board uled specifically that it was an interurban electric railroad, not a part of a steam railroad, and therefore not subject to the jurisdiction of the Labor Board; the Commission under date of October 12, 1920, also made an informal ruling that it was not subject to the Transportation Act governing the issuing of securities; for these reasons (145) steps looking to the completion of the work have been taken without applying to the Commisson.

The tables I have prepares show that in 1915, the first full year of operation, the Piedmont and Northern earned from freight traffic $4,413.00 per mile; the Southern Railway on all lines in North and South Carolina received from the same source $5,754.00 per mile; the Seaboard Air Line, $4,613.00; and the Atlantic Coast Line, $4,492.00.

For the year 1926 these figures were:

| | |
|---|---|
| Piedmont and Northern | $17,891.00 |
| Southern Railway | 16,725.00 |
| Seaboard Air Line Railway | 12,390.00 |
| A. C. L. Railway | 13,790.00 |

The percentage increase of Piedmont and Northern was 305.41; of the Southern Railway, 190.67; of Seaboard Air Line Railway, 168.59; of the Atlantic Coast Line Railway, 206.99.

Cross Examination.

Freight traffic of the P. and N. is now about 92 per cent and about 80 per cent of that is interstate traffic and about 12 per cent intrastate traffic.

In 1926 the P. and N. handled 72,000 cars in interchange. We had at one time a regular Pullman schedule with the Seaboard. My present estimate is that with the proposed line built we will handle 85,000 cars per annum in addition to the 72,000 now handled. Of the total of 157,000 cars, approximately 26,000 will be coal and coke.

The balance of the 157,000 cars would be made up (146) of grain, packing house products, fruits and vegetables, building material, cotton and waste, sandstone, merchandise, etc., largely from the East, West and the Southeast.

The Duke Power Company has a steam plant at Greenville, S. C., which is on our line, on the Southern, and on all the other lines at Greenville; the next steam plant is at Duncan which is a smaller plant; the Greenville and Greensboro plants are smaller plants. When the new lines are built I don't think the coal down there (in S. C.) will be handled differently from what it is now unless it would be "distress coal". The next steam plant is at Mt. Holly and its coal is handled by the P. and N. and will continue to be handled by it if the new lines are built; the next plant is at Salisbury which is a much larger one and I assume the Southern hauls it now; if the new lines are built coal for it will be handled by the P. and N. because it was put there by Mr. Duke's instructions that his railroad would be built by that

point, his instructions being that the steam plant was to be put there so that it would couple in with the P. and N. which would get the freight. The next steam plant it as Greensboro; it is a small plant and I think is served by the Southern.

I heard Mr. Lee testify about the steam plants projected; one of them to be built between the Yadkin River crossing and Winston-Salem; the P. and N. would handle coal to that plant.

If we build the lines, we will have a through Southern Route by the Georgia and Florida into Florida and all the other roads we connect with, and would have a through route from Florida on through the North and
(147) West. I would not say absolutely that is what we want; that was one of the things that prompted going ahead with the railroad and to protect our situation against the roads that are now opposing us. I have had no arrangement and had nothing to do with the Georgia and Florida; I had no correspondence with them and they have not corresponded with me.

The P. and N. has 337 box, automobile, flat dump and all cars. Some of these interchange with the other roads and some do not. Not all of the 82,320 cars of additional business the first year would be taken from our present connections; there would be included local business and any new industrial business that would be located on this line; the balance would be drawn from other lines and some would come from our old line.

We expect that approximately 15 per cent of the new business will be overhead traffic,—that is, traffic which originates and is destined beyond the line of the P. and N.

He said that he did not think he discussed with Mr. Duke the question of taking up with the Winston-Salem Southbound the matter of trackage rights; he would not have attempted to settle the matter without referring it to Mr. Duke and the Board of Directors. The construction of this line to Winston-Salem was decided on prior to 1925, definitely decided upon—it was not definitely decided upon, he would not say. Mr. Duke said he would go ahead, but it had to be submitted to the Board of Directors before it was finally settled. The letter of August 28, 1925, to the Winston-Salem South-
(148) bound refers to the movement on foot by the peo-

ple between Charlotte and Winston-Salem to get Mr. Duke interested in building an electric railway between those points, and asked if some arrangement might be made for the joint use of the Winston-Salem Southbound tracks between Lexington and Winston-Salem if Mr. Duke should give favorable consideration to the the proposition. The people in this section were always pushing Mr. Duke and the other officers of the Company on the question of the projection. The letter of February 2, 1927, stated that it had been definitely decided to extend the lines of the Piedmont and Northern, and that it was desired that negotiations for the joint use of the tracks of the Southbound be renewed. The letters between the Piedmont and Northern and the Southbound correctly state the facts so far as they were written by me.

In answer to the questionnaire filed with the Commission it is stated on page six: "Applicant's line when completed will afford to this section a much needed local and switching service and local passenger service with frequent stops that is not generally supplied by standard steam railroads; will supply elastic and flexible transportation facilities between cities and towns and industrial centers in the Piedmont Section of North and South Carolina, and also form connections with carriers reaching outside territory." The questionnaire was verified by the witness, and he was giving the Commission his opinion as to the purpose and functions which would be subserved by this line. All of these func-
(149) tions are important in serving this section of the country, and one could not stand alone without the other. Both the local passenger service and the freight service are needed, but the freight service probably would predominate. The local service of the Piedmont and Northern is its main contribution to the public.

According to the map in the Official Guide the proposed line of the Piedmont and Northern runs about 20 miles South of Winston-Salem.

In running freight trains from Greenwood to Winston-Salem they would not pass over the streets; through traffic, in a large measure, would not go over the streets, not any of it to any extent. At Charlotte and other places we diverge from the street car line and come into the City over the street car line; it would not be neces-

sary to operate through freight cars through Charlotte and Winston-Salem streets. We would use the local street railway at all of the towns in connection with the outside lines for pick-up and delivery service.

The Commission introduced as its Exhibit 42, memorandum of agreement dated April 1, 1914, between the Charlotte Electric Railway Company and the Piedmont Traction Company. By this agreement the Charlotte Electric Railway Company grants to the Piedmont Traction Company trackage rights over certain street railway tracks on Mint, Trade, Tryon and First Streets in the City of Charlotte for the carriage of passengers and trackage rights over certain street railway tracks on Mint Street for the carriage of freight and passengers all in the City of Charlotte.

The Commission introduced as its Exhibit 43 contract between the Greenville Traction Company and the (150) Piedmont and Northern Railway Company, dated May 22, 1914, by which certain trackage rights in the City of Greenville over street railway lines of the Traction Company are granted to the Piedmont and Northern Railway Company..

The Commission introduced as its Exhibit 46, testimony of J. S. Cureton, Traffic Manager for the P. and N., on the hearing before the Interstate Commerce Commission, in substance, as follows:

He has personal knowledge of the service furnished by his road: it is different in character from that furnished by steam railroads, as to passenger service, the trains make more frequent stops than the steam trains; 49 passenger trains are run daily on various parts of the 128 miles of line; there are 106 stops where passengers are taken on or let off. Between Greenwood and Belton, 31 miles, three trains are operated each way per day by the P. and N., making when necessary 63 stops. The Southern runs two passenger trains each way, making ten stops. Between Belton and Greenville, 26 miles, four trains a day are operated each way, making 72 stops; the Southern runs one train a day each way, making eight stops. Between Greenville and Spartanburg, 32 miles, four passenger trains are operated each way a day and an additional one each way on Saturday, making 120 stops. The Southern Railway operates eight

passenger trains a day, making 20 stops. Between Gastonia and Charlotte the P. and N. runs four trains each way daily and makes 72 stops and the Southern runs eight trains and makes 14 stops. Of the Southern passenger trains between Greenville and Spartanburg and between Gastonia and Charlotte, there are only three in each direction which are considered local trains, the (151) others making few stops and being for the accommodation of through passengers. He has personal knowledge of the operation of freight trains on the P. and N. and of the character of service furnished. The frequent operation of freight trains in small units has been been the foundation of the freight traffic growth; eighteen freight trains a day on the 128 miles of road are operated virtually rendering switching service all over the lines. The average number of freight cars to the train is 14 loads and six empties, permitting rapid switching and movements; all trains set out and pick up cars all over the line; this kind of service will be given on the proposed mileage.

He had had compiled a list of movements of cars from the P. and N. yards for delivery to consignees and similar movements of cars from the Southern Railway yard during the first four months of 1927. This covers 283 cars delivered from the Piedmont and Northern to the Southern Railway for delivery to consignees, on its line, and 183 cars handled from the Southern to the Piedmont and Northern for delivery to consignees on the P. and N. at Charlotte; 674 cars handled from the P. and N. to the Southern for delivery to consignees on the Southern and 100 cars handled from the Southern to the P. and N. for delivery to consignees on the P. and N. at Greenville. This list shows a very much quicker delivery by the P. and N. to consignees on its lines than by the Southern to consignees on its lines. A large number of similar instances could be cited to show that the methods of operation of the P. and N. permit more rapid handling of shipments than on the steam lines. A study of a large number of shipments shows that the (152) P. & N. can and does handle less than carload shipments with greater dispatch than the steam lines and numerous instances of shipments to sustain this statement were cited.

CROSS EXAMINATION.

He considers the Piedmont and Northern Railway as an interurban railroad plus; it performs all the characteristic service of an interurban railroad and equals that of the standard railroads in other respects; the extension of the line as proposed will not change the character of the service in the least and it will continue to be primarily an interurban railroad, and this would be true if it were extended to Durham. If the road is built from Greenwood to Winston-Salem as proposed, it will be approximately 240 miles long.

I have made no study between the P. and N. and other electric interurban railways. I do not know whether the distinguishing characteristic of an electric interurban railroad is the dominance of local and interurban passenger traffic. I do know that the passenger, baggage and express traffic do not predominate on the P. and N. Essentially and in the large, the P. and N. is a freight carrier, and it is from freight that it gets its revenue, and that is the source it expects to get its revenue from when extended. The great majority of freight on the P. & N. is interstate.

Interstate freight as we handle it is local in character in that the service performed at the delivery and the initial points is purely local. To us we do not distinguish between the handling of interstate and intrastate traffic for the reason that it is a purely local traffic with us, whether it goes off our line a short distance or (153) whether it stays on the line. Therefore, the distinction as to interstate traffic would not apply in the same way to the Piedmont and Northern as it would to longer lines. The reason I say that a large part of our traffic is local is because of the comparatively restricted scope of the length of our line.

Interstate freight as handled by the P. and N. is local in character in that the service performed at the delivery and the initial points is purely local, that is, the freight carried is local freight, as well as that which stays on the lines of the P. and N. The reason I say a large part of our traffic is local is because of the comparatively restricted length of our line; sixty per cent of our freight traffic is interchanged with other carriers; the majority

of that moves across state lines, though there is a great volume moving within the state; I am viewing the whole traffic from the standpoint of the function performed by our line; sixty per cent of our freight is interchanged with other carriers; the P. and N.'s freight cars are interchanged with other railroads. Last year we handled 72,886 loaded cars initially. I would say from my knowledge and belief that the great proportion of the traffic that is carried over the Piedmont and Northern is carried in the rolling stock and equipment of other standard railroads.

The P. and N. belongs to the Per Diem Association; the number of cars belonging to other companies used by the P. and N. is largely in excess of the number owned by it; the P. and N. belongs to the Southern Freight Association and American Railway Association, (154) the Southern Weighing and Inspection Bureau and Southeastern Demurrage Association; I don't know of any other electric interurban railroads that belong to those associations; passenger traffic of the P. and N. has fallen off in recent years due to competition of the automobile and local passenger traffic is becoming of less importance. The competition of the automobile has been reflected in the passenger revenues of the road; the passenger traffic on the road, ax extended, would not support the road.

The traffic which we would expect to handle over the lines as extended, moving up from Georgia or originating on and south of the Georgia and Florida, going to the Middle West, say Buffalo-Pittsburgh territory, would be a large volume of melons, *cantalopes,* produce and vegetables of all sorts, lumber and forts products, and possibly eitrus fruits. Commodities which we would expect to move from the North and West over the Norfolk & Western or its connections and delivered to us at Winston-Salem, and moving to points on our line and beyond, southward, would be Virginia apples, tomatoes, canned goods, plaster, cement and New York State and Canadian produce. Of course, coal would be the largest commodity which we would expect to handle on our line.

What he meant by an interurban line is a line doing the business of the character of the Piedmont and Northern, and further that if the Piedmont and Northern were connected up with the Norfolk and Western and maybe

with other lines, that this would not justify a change in the terms as it would still be interurban.

(155) The P. and N. receives an average of 11.2c rental per year, per square foot on its warehouse property and in this section the Southern Railway receives 8.9c per square foot for such property and the Charleston and Western Carolina, 5.7c per square foot; the P. and N. receives 1.4c per square foot ground rent for property which it rents and for similar propety the Southern receives 1.3c and the C. and W. C. 1c per square foot. The P. and N. receives 9½ per cent on the capital invested in its warehouse property.

The Commission introduced as its Exhibit 52, the testimony of E. B. HARDIN, Auditor of the Piedmont and Northern Railway Company, on the hearing before the Interstate Commerce Commission, as follows:

Exhibit No. 39 before the Commission is a table of classified tonnage of the P. and N. for years 1923-6.

CROSS EXAMINATION.

Exhibit 39 shows total carloads handled in each of the years; in 1926 it shows 1,456,195 tons converted into cars was 95 per cent of the traffic; only 5 per cent of the traffic is less than carload. Exhibit 39 for 1926 shows total less than carload tonnage 75,314 tons, or 5 per cent of the total.

RE-DIRECT EXAMINATION.

The information shown on Exhibit 39 was gotten up with reference to tonnage and not with reference to cars. If it had been prepared with reference to cars, the percentage between the carload shipments and the less than carload shipments would show less than car-
(156) load shipments to be approximately 20 per cent of the total.

Mr. Hardin testified that less than carload business of the P. and N. as to tonnage was twenty per cent of the total business. The figures I have show that the LCL business for the United States as a whole is 2.79 per cent; for the Southern region it is 3.84 per cent and for the

Southern District as a whole it is 3.08 per cent; for the New England region it is 6.74 per cent and for the entire Eastern District it is 2.73 per cent.

The Commission introduced as its Exhibit 60, a certified copy of circular letter sent out to all carriers by the Interstate Commerce Commission on or about May 25, 1920, as follows:

"By paragraph (18) of Section 1 of the Interstate Commerce Act, as amended by the Transportation Act, 1920, it is provided that after ninety days after said paragraph takes effect no carrier by railroad subject to the Act shall undertake the extension of its line of railroad or the construction of a new line of railroad, or shall acquire or operate any line of railroad or extension thereof, or shall engage in transportation under the Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction or operation or construction and operation of such additional or extended line of railroad, and no carrier by railroad subject to the Act shall abandon all or any portion of a line of railroad, or the opera-
(157) tion thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. The Transportation Act was approved, and said paragraph took effect on February 28, 1920, and therefore, the provisions of the paragraph apply to all extensions, constructions, acquirements and operations, and to engaging in transportation under the Act after May 28, 1920, and also to abandonments of all or any portion of a line of railroad, or the operation thereof, after said last mentioned date. Inquiries have been made of the Commission as to whether or not certificates of convenience and necessity are required in cases where the extension or construction has been undertaken but the work has not been completed on May 28, 1920.

The Commission holds that if the projected extension or construction is actually undertaken in good faith on or before ninety days after the approval of the

Transportation Act, 1920, by a carrier subject to the Interstate Commerce Act which will operate the line, certificate will not be required of such *arrier* either for extension or construction or for acquirement, operation or engaging in transportation under the Act, but the undertaking must embrace not merely purpose or intent to extend or construct, but also the actual doing in good faith of acts calculated to completely effect such purpose.

"All carriers contemplating or engaged in such work should immediately notify the Commission of all the facts and circumstances connected therewith, in order that the Commission may determine whether or not (158) the work has been actually undertaken as contemplated by the Act and whether or not a certificate of convenience and necessity will be required."

Attached to the last exhibit is certificate of George B. McGinty, Secretary of the Interstate Commerce Commission, stating that the certificate is a true copy of notice to all carriers subject to the Interstate Commerce Act, dated Washington, May 25, 1920, and stating that service of the attached notice was made to the P. and N. on May 29, 1930, by posting in the office of the Interstate Commerce Commission.

P. F. MARSH, a witness for the Interstate Commerce Commission, testified that he was a Special Agent for the Commission, and prior to that time was with its Bureau of Statistics and Bureau of Accounts, having been in its service 36 years.

At the instance of the Commission he examined books and records of the defendant in its general offices at Charlotte from April 24th to June 8, 1930, and familiarized himself with matters about which he is testifying. This examination shows that the mileage of the P. and N., North Carolina Division, Charlotte to Gastonia, is 23.5 miles, Belmont Junction to Belmont, 3.19 miles; South Carolina Division, Spartanburg to Greenwood, 89.9 miles; Belton to Anderson, 11.3 miles; total main line operated, 127.89 miles. This mileage is as of December 31st, 1929.

The examination generally covered the years 1927,

1928, 1929 and the first three months of 1930 to bring the information up to date from the time of the hearing before the Commission of the P. and N.'s application in Docket No. 6208.

(159) Of the main line mileage 15.13 miles is operated by the P. and N. jointly with street car lines, and of this 15.13 miles, 2.9 miles of the main line tracks are in streets at Anderson, Charlotte and Gastonia; this is approximately 2.25% of the total main line track operated. The P. and N. operates the street railway system at Gastonia, but those at Charlotte, Greenville and Anderson are operated by the Southern Public Utilities Company. Also, there are 37.24 miles of sidings and turnouts, and 32.44 miles of miscellaneous spurs. Also, the P. and N. operates 16.79 miles of tracks under trackage rights over tracks owned by connecting carriers and miscellaneous industries, including a number of industrial spurs used exclusively for freight service.

I investigated the records as to equipment owned; on March 11, 1930, it owned six locomotives of 55 tons weight each, tonnage ratings, each 800; six locomotives weight in tons each 63, tonnage ratings, 900; two locomotives, weight in tons, each 75, tonnage rating, 750 each; one locomotive, weight in tons, 85, tonnage rating, 1,200; one locomotive, weight in tons, 95, tonnage rating 1,200; and one locomotive, weight in tons, 100, tonnage rating, 1,350. This information as to locomotives is set out in tabulation, which is introduced as the Commission's Exhibit 61.

I investigated the record as to passenger, freight and other cars owned and in service on March 11, 1930. It owned 17 passenger cars with electric equipment; without such equipment, 2; freight cars without electric equipment, 287; none with electric equipment; express cars with electric equipment, none; without electric equipment, 2; combination cars with electric equipment, 6; without electric equipment; none; work cars with (160) such equipment, none; without, 16; business cars with such equipment, none; without, one; other cars with such equipment, none; without electric equipment, 11 cabooses; total 342 units of equipment. Of this all freight cars 287, and one business car are interchangeable with steam roads. This information is set out in Commission's Exhibit 62.

By being interchangeable with steam railroads, means that the trucks, coupling arrangement and brakes are such as will fit into a regular freight train on a steam road. I investigated extent of interchange by the Piedmont and Northern of freight equipment with foreign lines in order to reflect the large number of foreign cars on the P. and N. line and the number of P. and N. cars on foreign lines at or about March, 1930. Journal entry No. 28 shows the amounts receivable from foreign lines for use of Piedmont and Northern equipment during the month of February, and shows that such equipment was on 102 different railroads operating in practically all parts of the United States; this equipment was freight cars. This Journal Entry No. 28 gives the name of the lines using the Piedmont and Northern equipment and the amount of car rental charge for such use. This Journal Entry is Commission's Exhibit 63.

I investigated the records as to the use by the Piedmont and Northern of freight cars belonging to foreign lines to show the situation in March, 1930, being practically a copy of Journal Entry No. 27, which shows freight cars owned by forty private carline companies and freight cars owned by 91 different freight lines were on Piedmont and Northern lines during the month of March, 1930. The Piedmont and Northern, and practi-
(161) cally all steam roads subscribe to the American Railway Association per diem, having a fixed charge of One Dollar a day car rental; when a foreign line car is on the P. and N., the P. and N. pays the foreign line a dollar a day and *vice versa*, which is the universal practice by standard agreement fixed by the American Railway Association. Journal Entry No. 28 shows that during March the amounts received by the Piedmont and Northern were approximately $5,600, which was rental for use of its cars on foreign lines, and the amount paid by the Piedmont and Northern in March for use of foreign cars, including private cars, was approximately $16,650.00. Journal Entry No. 27 is the Commission's Exhibit 64.

I took the month of March so as to show the interchange at the time of this proceeding; I also got total figures for 1929, which show that the month of March was a little less than an average month. In 1929 the Piedmont Northern received a total per diem of $92,

201.05, and paid a total of $215,779.07, so that the amount paid and received in March is a little less than one-twelfth of these amounts. I believe that the figures for March are representative of the general business of the Company.

I ascertained the points at which the present lines of the P. and N. interchange with other lines during the month of March, and selected March 1st as being a representative day; this shows the P. and N. interchanged freight cars at Charlotte with the Southern; at Pinoca with the S. A. L.; at Belmont, March 7th, with the Southern; at Gastonia with the Southern, and also with the Carolina and Northwestern; at Downs, South Carolina, March 10th, with the Southern; at Greenwood, (162) South Carolina, with the S. A. L., and also with the Georgia and Florida; at Shoals Junction, South Carolina, with the Ware Shoals; at Honea Path, March 7th with the Southern; at Belton with the Southern; at Anderson with the Blue Ridge and also with the Charleston and Western Carolina; and also with the Southern; at Williamston, March 11th, and at Piedmont, South Carolina, March 1st, with the Southern; at Greenville with the Southern, C. and W. C., and also with the Greenville and Northern; at Greer, South Carolina, with the Southern; at Spartanburg, South Carolina, with the Southern, the C. and W. C., and also the Clinchfield. Tabulated statement of this information is the Commission's Exhibit 65.

Most of these lines with which interchange were made are trunk lines; one or two are short lines; they are common carriers in interstate commerce, and all of them steam roads.

I investigated the records of the Piedmont and Northern as to revenues received from transportation, classified as to interstate, intrastate, freight and passenger; this covers revenues for 1927, 1928, 1929 and the first three months of 1930. For 1927 the revenue was as follows: Passenger revenue, $124,154.28; baggage $480.09; parlor car, $75.90; mail, $1,412.97; express, $40,050.00; milk, $4.78, a debit item; freight $2,340,809.58; switching $16,114.38; total, $2,523,092.42. The figures show that 92.8 per cent of the total revenue was from freight and 4.9 per cent was from passenger. For 1928 the ratio of freight and passenger revenue was 93.1 per cent to 4.6

per cent; for 1929, 94.5 per cent and 2.9 per cent; for the first three months of 1930, 95.7 per cent and 1.8 per cent. This information is tabulated as Commisssion's Exhibit 66.

(163) I investigated local and interline revenues of the Piedmont and Northern for the years 1927 up to April 1, 1930. It shows freight revenue, 1927 local traffic, $137,272.92, 5.9 per cent; interline traffic, $2,203,536.66, 94.1 per cent; passenger revenue (local traffic), $121,-063.56, 97.5 per cent; interline, $3,090.72, 2.5 per cent; for 1928, freight traffic, local, 4.5 per cent; interline traffic, 95.5 per cent,—$98,745.06 and $2,086,365.30, respectively; passenger, local traffic, $105,917.93, 97.8 per cent; interline traffic $2,361.25, 2.2 per cent; 1929 freight, local traffic, $100,553.02, 4.3 per cent; interline, $2,216,-975.75, 95.7 per cent; passenger, local $70,010.68, 97.8 per cent; passenger, interline, $1,552.04, 2.2 per cent; for three months of 1930, freight, local, $23,188.25, 4.3 per cent; freight interline, $512,777.49, 95.7 per cent; passenger, local, $9,828.08, 97.7 per cent; interline, $236 69, 2.3 per cent. Tabulation of this information is the Commission's Exhibit 67.

I examined the records with regard to revenue received from interstate and intrastate traffic. For 1927, freight revenue on intrastate traffic, $258,347.53, representin[illegible]1 per cent of the total traffic; from interstate traffi[illegible]2,082,462.05, representing 89 per cent of the traffice; passenger intrastate traffic, $123,142.71, representing 99.1 per cent of the total passenger revenue, and passenger interstate traffic, $1,011, .9 per cent; 1928 intrastate freight traffic, $390,382, 17.9 per cent; interstate freight, $1,794,728.19, 82.1 per cent; passenger intrastate, $106,924, 98.8 per cent; passenger interstate traffic, $1,354, 1.2 per cent; 1929, freight intrastate, $447.-996, 19.3 per cent; freight interstate, $1,869,532, 80.7
(164) per cent; passenger intrastate, $71,261, 99.6 per cent; passenger interstate, $301, .4 per cent; for the three months of 1930, freight intrastate, $112,889, 21.1 per cent; freight interstate, $423,076, 78.9 per cent; passenger intrastate, $10,033, 99.7 per cent; passenger interstate, $30.84, .3 per cent. A tabulation of this informa tion is the Commission's Exhibit 68.

I examined the defendant's books relative to expenditures, total investment and equipment as between ex-

penditures for locomotives and freight cars and equipment used exclusively in freight service. The P. and N.'s annual report to the Commission for the year ending December 31st, 1929, shows total investment in equipment since 1914, $778,194, of which $674,803, or approximately 85 per cent, represents expenditures for locomotives and freight cars, which equipment, of course, is used exclusively in freight service.

I have prepared statement of carload and less than carload tonnage handled during the years 1928, 1929 and the first two months of 1930, which shows the number of tons handled in carloads and less on the North Carolina Division and on the South Carolina Division, separated as between local overhead delivered to connections and received from connections; it also shows total local traffic and total interchange traffic. It shows total carload traffic represents 94.26 per cent of the total tonnage; and the less than carload traffic, 5.74 per cent; these figures were taken from the defendant's comparative statement of classified tonnage kept by its auditor, and in making up that statement he includes both less than carload and carload textiles under carloads, so I made a deduction of textiles on this statement to show the ratios of total (165) tonnage, carload and less than carload, excluding textiles, which makes a slight difference, and that shows that the carload traffic for 1928 was 93.79 per cent and the less than carload, 6.21 per cent of the total traffic of the system; for 1929, including textiles carload traffic was 93.88 per cent and less than carload, 6 12 per cent; excluding textiles, the carload traffic was 93.34 per cent and less than carload 6.66 per cent; for two months ending February 28, 1930, including textiles, carload traffic was 93.62 per cent; less than carload 6.38 per cent; excluding textiles, carload traffic was 93.05 per cent; less than carload, 6.95 per cent. Tabulation of this information is the Commission's Exhibit 70. It shows that in 1928 the North Carolina Division handled 47.7 per cent, and the South Carolina Division handled 52.3 per cent; total local traffic on system, 3.53 per cent; total interchange traffic, 96.47 per cent. In 1929 the North Carolina Division handled 39.8 per cent and the South Carolina Division handled 60.2 per cent; local traffic, 3.72 per cent; interchange traffic, 96.28 per cent. For the two months of 1930, North Carolina Division, 36.7 per cent;

South Carolina Division 63.3 per cent; total local traffic, 3.73 per cent; interchange, 96.27 per cent.

I prepared a tabulation of the actual number of loaded cars interchanged with connecting lines by the Piedmont and Northern during 1927, 1928, 1929, and through three months of 1930. For 1927 the P. and N. received from the S. A. L., 36,419 carloads, and delivered to the S. A. L. 19,175 carloads; total, 55,594. It received from the Southern 5,340 carloads and delivered (166) 2,428, a total of 7,768 carloads; from the Charleston and Western Carolina it received 958 carloads and delivered 355; total, 1,313. From the Clinchfield it received 5,867 carloads and delivered 1,101, a total of 6,968 carloads; this makes a total for the year of 48,584 carloads received, and 23,059 delivered, a grand total of 71,643 carloads. In 1928, the P. and N. received from the S. A. L. 35,702 carloads, and delivered to it 18,775; total, 54,477 carloads; from the Southern was received 5,389 carloads and delivered 2,022; total, 7,411. From the Charleston and Western Carolina was received 1,217 carloads and delivered 387; total, 1,604. From the Clinchfield, the P. and N. received 4,705 carloads and delivered 3,207, a total of 5,912. Grand total received by the P. and N. 47,013 carloads, and delivered 22,391; total, 69,404. For the year 1929 the P. and N. received from the Seaboard Air Line Railway 36,572 carloads and delivered 19,476; total, 56,048; from the Southern, 4,738, delivered 2,234 carloads, a total of 6,972 carloads; from the C. and W. C., it received 1,106 carloads and delivered 107; total 1,213 carloads; from the Clinchfield was received 6,192 carloads, delivered 1,907; total, 8,099. From the Georgia and Florida the P. and N. received 655 carloads and delivered 263; total 918. Total carloads received, 49,263; total delivered, 23,987; grand total 73,250. For the first three months of 1930, the Piedmont and Northern received from the Seaboard Air Line Railway 8,593; delivered 4,811; total, 13,404 carloads; from the Southern it received 915 carloads and delivered 541; total, 1,456; from the C. & W. C., it received 186 carloads and delivered 3, a total of 189 carloads; from the Clinchfield the P. and N. received 1,424 (167) carloads and delivered 710; total, 2,134; from the Georgia and Florida it received 446 carloads and delivered 120; total, 566. This makes a grand total of 11,-

564 carloads received; 6,185 delivered, a grand total of 17,749. This information tabulated is the Commission's Exhibit 71.

I ascertained a summary of total loaded cars handled and percentage of carload traffic received from and delivered to connecting lines; this was for the three calendar years ending December 31st, 1929, and the first three months of 1930; this shows total loaded cars handled in 1927, 71,643, representing 92.5 per cent interchanged; local, 5,845, representing 7.5 per cent interchanged; total loaded cars handled, 77,488. During 1928 the loaded cars interchanged, 69,404, representing 94.1 per cent; loaded cars handled local, 4,316, representing 5.9 per cent; a total of loaded cars handled for the year of 73,720. For 1929, total loaded cars interchanged 73,250, representing 94.6 per cent; total loaded cars local, 4,187, representing 5.4 per cent; total loaded cars handled, 77,437. For the first three months of 1930, total loaded cars interchanged, 17,749, representing 95.5 per cent; total loaded cars handled locally, 844, or 4.5 per cent; total loaded cars handled during the 3 months of 1930, 18,593. This information is tabulated as the Commission's Exhibit 72.

I have prepared statement from the record of the Company showing number of passengers handled, loaded cars on line, empties on line as divided between foreign and system cars; number of cars interchanged with Seaboard Air Line Railway, both received and delivered on (168) local business and on overhead business; also, the same information with the C. C. & O., Georgia and Florida, Southern, the C. & W. C., and the G. & N. by days. The only report for Sundays covers passengers. The daily average for 1930 shows passengers handled, 259; loaded cars on line, 309; empty cars on line, 27; foreign, 33 system, system being P. and N. The S. A. L. received 112, delivered 57. The S. A. L. overhead received 4 and delivered 6. The C. C. & O. local received 13 and delivered 1; overhead received 5 and delivered 8. The Georgia and Florida local received 4, delivered 1; overhead received 3, delivered 1. The Southern received 11, delivered 8; C. and W. C. received 3, delivered less than 1; the G. and N. received 2 and delivered 1. These represent daily averages based on the number of working days during that month. This shows that there

is more than one loaded car on the line each day for each passenger carried and shows that there are 27 foreign cars on the line each day, as compared with 33 system cars. It shows as to empties on the line, 45 per cent are foreign cars. This tabulation is the Commission's Exhibit 73.

I investigated from the records of the defendant the scope of the destination and origin of shipments forwarded by and forwarded to points on defendant's lines. This investigation represented shipments forwarded from Charlotte, the largest shipping point on the North Carolina division, and Greenville, the largest station on the South Carolina Division, for one day, March 1st, 1930. This day was selected at random, and selected in March for the purpose of reflecting conditions at or about the time of this proceeding; however, I believe March 1st is a representative day of business. (169) Shipments forwarded from Charlotte on March 1st were 32 to points in North Carolina, 9 to points in South Carolina, 3 to Georgia, 3 to Texas, 3 to Michigan, 2 to Pennsylvania, 1 to Massachusetts and one each to Connecticut, New York, Rhode Island, Ohio, Illinois, California, Minnesota, Tennessee, Virginia, and Louisiana. As to shipments received on the same date, 27 originated at points in North Carolina, both on lines of the P. and N. and on other railroads, and 23 from New York State, 15 from Illinois, 14 from Virginia, 10 from South Carolina, 5 from Pennsylvania, 3 from Maryland, 3 from Georgia, 3 from Tennessee, 2 from Mississippi, and one each from Ohio, Masschusetts, Vermont, Kentucky, Florida, Indiana, Oklahoma, Louisiana New Jersey, West Virginia and the State of Washington, tabulated statement of this information is the Commission's Exhibit 74.

Commission's Exhibit 75 is the same information as for Greenville, South Carolina, as set out in Exhibit 74, and shows that on March 1st shipments were from Greenville, South Carolina, to New York, 47, South Carolina 36, including local as well as interline; Pennsylvania, 22; Illinois, 13; Ohio, 12; Maryland, 11; Massachusetts, 7; Georgia, 7; West Virginia, 6; New Jersey, 5; Virginia, 5; North Carolina, 5; Indiana, 4; Minnesota, 4; Florida, 4; Michigan, 3; Texas 3, Rhode Island 3, Iowa 3, Missouri 2, State of Washington 2, Louisiana 2,

and one each to Idaho, Delaware, Wisconsin, Alabama and Maine. The following were shipments received at Greenville: From Georgia, 17, Pennsylvania, 14, South Carolina, 13, including local and interline, North Carolina, 13, Virginia 12, Illinois 11, Louisiana 9, New York 8, Maryland 7, Tennessee 5, Mississippi 3, West Virginia (170) 3, New Jersey 2, Kentucky 2, Indiana 2, Ohio 2, Maine 2, and one each from Wisconsin, Massachusetts, New Hampshire, Arizona, Texas and Kansas.

I investigated the defendant's records as to freight movements over the North and South Carolina Divisions on March 1st, 1930. It shows that Engine X5002 from Pinoca to Gastonia left with 14 loaded cars and 2 empties, and arrived with 11 loaded cars, 1 empty. Engines X5000 and X5004, indicating that there were two locomotives on that train, left Pinoca with 27 loaded cars and no empties and arrived at Charlotte with 27 loaded cars, no empties. Engine X5003 left Pinoca with five loaded cars, 3 empties, arrived at Belmont with 3 loaded and 3 empties. Engine X5000 left Charlotte with 7 loaded and 7 empty cars and arrived at Pinoca with 7 loaded, 7 empties. Engine X (no number shown) left Charlotte with 5 loaded, 8 empties; arrived at Pinoca with 5 loaded, 8 empties. Engine X5002 left Gastonia with 11 loaded and 7 empties, arrived at Pinoca with 14 loaded, 10 empties. Engine X5003 left Belmont with 6 loaded, 2 empties, arrived at Pinoca with 18 loaded, 2 empty. Engine X left Pinoca with 6 loaded, 1 empty, arrived Charlotte 6 loaded and 1 empty. South Carolina Division: Train No. 46 left Greenwood with 28 loaded, no empty, and arrived Spartanburg with 18 loaded, 7 empty. Train No. 48 left Greenwood with 36 loaded, 11 empty; arrived Spartanburg with 9 loaded, 4 empty. Train No. 60 left Greenwood with 8 loaded, 3 empty and arrived at River Junction with 5 loaded and 2 empty. Engine X5601 left Belton and went to River Junction with no loads and no empties. Engine X5600 left Lyman with no loaded and 3 empty and arrived Spartanburg with 2 (171) loaded and 4 empty. Train No. 20 left Belton with 9 loaded, no empty; arrived at Anderson with 6 loaded and no empty. Train No. 21 left Anderson with 10 loaded, 8 empty; arrived at Belton with 10 loaded and 8 empty. Train No. 45 left Spartanburg with 24 loaded, no empty; arrived at Greenwood with 12 loaded,

1 empty. Train No. 61 left River Junction with 5 loaded, no empty, and arrived at Greenwood with 13 loaded and 3 empty. Engine X5601 left River Junction with 1 loaded and no empty, and arrived Belton with 1 loaded. no empty. Engine X5606 left Spartanburg with 1 loaded, 1 empty; arrived at Lyman with 4 loaded and no empty. Engine X5100, and Train No. 47 left Spartanburg with 6 loaded, 14 empty, and arrived at Greenwood with 37 loaded and 23 empty. On its arrival at Spartanburg, it shows it had Motors 5100 and 5102. Tabulation of this information is the Commission's Exhibit 76.

I investigated movement of trains during the first ten days of March. Train 46 left Greenwood with 28 loaded cars, no empties; arrived at Spartanburg with 18 loaded and 7 empty. Train No. 48 left Greenwood with 36 loaded cars, no empties, and arrived at Spartanburg with 9 loaded and 4 empty. On March 2nd, Train No. 46 left Greenwood with 21 loaded, no empties; arrived at Spartanburg with 14 loaded, 11 empties. No. 48 left Greenwood with 35 loaded, 12 empties; arrived at Spartanburg with 7 loaded and 6 empties. March 3rd, Train No. 46 left Greenwood with 31 loaded, no empties; arrived at Spartanburg with 22 loaded, no empties. No. 48 left Greenwood with 27 loaded, 3 empties; arrived at Spartanburg with 5 loaded, 2 empties. March 4th. Train No. 46 left Greenwood with 26 loaded, 2 empties; arrived Spartanburg with 17 loaded, 10 empties. Train (172) No. 48 left Greenwood with 13 loaded, 4 empties; arrived at Spartanburg with 1 loaded and 6 empties. March 5th. Train No. 46 left Greenwood with 22 loaded, no empties; arrived at Spartanburg with 20 loaded, 10 empties. Train No. 48 left Greenwood with 20 loaded, 13 empties; arrived Spartanburg with 5 loaded, 10 empties. March 6th. Train No. 46 left Greenwood with 20 loaded, 2 empties; arrived Spartantanburg with 17 loaded, 12 empties. No. 47 left Greenwood with 31 loaded, 8 empties; arrived at Spartanburg with 9 loaded and 6 empties. March 7th. Train 46 left Greenwood with 19 loaded, 2 empties; arrived Spartanburg with 15 loaded and 6 empties. No. 48 left Greenwood with 24 loaded and one empty; arrived at Spartanburg with 10 loaded and 6 empties. March 8th. Train No. 46 left Greenwood with 20 loaded and 3 emp-

ties; arrived at Spartanburg with 10 loaded, 15 empties. Train 48 left Greenwood with 34 loaded, 7 empties; arrived at Spartanburg with 12 loaded, 4 empties. March 9th. Train No. 46 left Greenwood with 23 loaded, no empties; arrived Spartanburg with 14 loaded, 9 empties. No. 48 left Greenwood with 34 loaded, 3 empties; arrived at Spartanburg with 5 loaded, 9 empties. March 10th. Train No. 46 left Greenwood with 35 loaded, 2 empties; arrived at Spartanburg with 13 loaded and 5 empties. No check on No. 48 for March 10th. Tabulation of this information is the Commission's Exhibit 77.

From the records of the Company I ascertained that it has an Assistant Traffic Manager at Cincinnati, Ohio, General Eastern Agent at New York, Commercial Agent at Atlanta, and one at Dallas, Texas, who apparently are full time employees and on a straight salary basis, (173) receiving substantial salaries. The P. and N records show that it is a member of the American Railway Association, Railway Accounting Officers' Association, Railway Treasury Officers' Association, Southern Association Car Service Officers, Southeastern Claims Conference, The Traffic Club of New York. The records show that it paid for service in other railway organizations in which it has representation, namely, Association of Railway Executive, Southern Freight Association Southern Weighing and Inspection Bureau, Southeastern Demurrage and Storage Bureau. The American Railway Association is a steam railroad association primarily; there may be electric railways which belong to it. Of course, there is also the Electric Railway Association. In the American Railway Association, the dues include subscription to the per diem agreement of that organization.

The Piedmont and Northern has a contract dated March 1st, 1929, with the Railway Express Agency, Incorporated, and are handling express matter under it; this is the old American Railway Express Company.

Piedmont and Northern Tariff Index No. 20, to which is attached Supplement No. 1 to Tariff Index No. 20, and Supplement No. 2 to Tariff Index No. 20, were obtained by me from the offices of the Piedmont and Northern. Index No. 20 is an index of the tariffs, freight and passenger, and classes in effect from and to stations on the Piedmont and Northern Railway. Section 1 of

the index gives a list of the freight tariffs in which the Piedmont and Northern is the initial carrier; Section 2, a list of freight tariffs published by foreign lines in which the Piedmont and Northern is shown as the delivery or (174) intermedate carrier; Section 3 is numerical list of freight I. C. C. number of the P. and N. Section 4 is list of passenger tariffs in which the Piedmont and Northern is the initial carrier; Section 3 is the numerical list of passenger I. C. C. numbers of the Piedmont and Northern; Section 6 is list of traffic on file at the P. and N. agency stations. The supplements contain such amendments as are made at the effective dates of the supplements. These tariffs indicate that the Piedmont and Northern apparently names rates on all commodities to all parts of the country, both carload and L. C. L. Index No. 20 with Supplements 1 and 2 are the Commission's Exhibit 80.

The Commission's Exhibit 81 is statement prepared under my direction, showing tariffs published by the Piedmont and Northern on file with the Interstate Commerce Commission, effective May 1st, 1930, and these tariffs carry the tariff index; they are either in the index or in the supplement; in addition to the tariffs, the Piedmont and Northern has powers of attorney and concurrences issued by the P. and N. and filed by the Interstate Commerce Commission, and a list of these powers of attorney and concurrences are the Commission's Exhibit 81.

The Commission's Exhibit 82 is statement showing tariffs published by other lines or agents in which the Piedmont and Northern is an initial carrier, and concurred in by the P. and N. in force May 1st, 1930.

The Commission's Exhibit 83 is list of rate proposals made by the Piedmont and Northern to the Southern Freight Association from 1926 to 1929, and three months of 1930; these are proposals by the Piedmont (175) and Northern to amend some rate or initiate some rate. It is docketed for consideration, presumably by the Southern *Freighith* Association, and sent out to the members of the line and finally acted upon, and if the proposal is favorably disposed of, they issue a docket advice.

During the year 1929, the Piedmont and Northern purchased tariffs from the Atlanta Freight Bureau, C.

T. Guthrie Tariff Bureau, Illinois Freight Association, Louisville Freight Tariff Bureau, National Perishable Freight Committee, New England Freight Committee, New England Freight Passenger Association, Richmond Freight Traffic Bureau, Southern Classification Committee, Southeastern Passenger Association, Southwestern Freight Bureau, Southern Ports Foreign Freight Committee, Transcontinental Freight Bureau, Trunk Lines Association, Western Trunk Line Committee. These are associations of railroad organizations around the United States that publish tariffs for their members.

I investigated the minute books of the stockholders' and directors' meetings of the defendant at each and every meeting from its organization to March 26, 1930. The first meeting of incorporators was held November 17th, 1913, when the charter was adopted, the charter having been approved by the Legislature of South Carolina, February 24th, 1911. The minutes of a special meeting of stockholders on May 18, 1914, shows that the stockholders authorized the purchase of the Greenville, Spartanburg and Anderson Railway Company and the leasehold, etc., of the Piedmont Traction Company and authorized the directors to create an issue of Fifty Million Dollars first mortgage 40-year gold bonds, payable (176) July 1, 1954. This resolution includes the following:

"For the purpose of providing for the payment of the purchase money of the aforesaid leasehold lines of railroad, property, rights, privileges and franchises, and to provide funds with which to construct extensions and branches of and additions to said lines of railroad, and to make permanent improvements to and betterments of the lines of railroad which/or the lease thereof are or may from time to time be owned by this company, and more fully equip the same, and construct, purchase or otherwise acquire additional lines of railroad and other property for use in connection with the operation of such lines of railroad, now owned or leased or to be hereafter constructed or acquired and to accomplish the several and respective corporate powers and objects of the Piedmont and Northern Railway Company and for other lawful purposes," etc.

At the same meeting the stockholders authorized the issue of $8,500,000.00, 5-year notes, and the execution and issuance of $10,000,000.00 of said mortgage bonds as security therefor in the purchase of said railway property. On May 18, 1914, at a directors' meeting the $50,000,000.00 bond issue was authorized to purchase the two electric railway properties in the manner authorized by the stockholders on May 18th. The next mention in the minutes of an extension of lines was at a special meeting of directors on March 17, 1916, which stated, "A general discussion with reference to the extension of line was had by Messrs. Moore, Smythe, Smith, Law and Lee". The next time the matter of extension is mentioned in the minutes is on January 29th, 1924, when a resolution was adopted declaring a dividend, and the minutes of the meeting state:

"RESOLVED That the directors, while gladly agreeing with Mr. Duke's views in regard to the dividend, request that Mr. Thomason confer with Mr. Duke with reference to the directors being in favor of a connection between Spartanburg and Gastonia being built before dividends are paid."

(177) That is the only mention in this minute that reference is made to the proposed extension. The dividends were paid.

At a meeting of the directors on June 15th, 1924, the minutes state:

"Mr. E. Thomason reported that he had conferred with Mr. Duke with reference to the construction of a connection between Spartanburg and Gastonia, as requested by the Directors at the last meeting, and that Mr. Duke stated that he had been considering the matter and would give the matter further consideration."

On August 11th, 1925, the minutes show the following resolution:

"Whereas, Mr. Duke is being urged by the general public throughout the section of the Carolinas served by

the lines of the Company, and other places, to construct additional lines of railroad or extensions, which if constructed may become a part of the system of this Company; and, whereas, if any of said additional lines of railroad or extensions are constructed it would probably be necessary or advisable for the company to expend large sums of money in the purchase and construction of additional rolling stock, trackage, terminals, etc., and, whereas, it is deemed advisable that the surplus and earnings of the company be held for the future requirements of the Company;

"Now, therefore, Be It Resolved, that the payment of dividends be discontinued."

Upon motion of Mr. John A. Law, duly seconded by Mr. V. M. Montgomery, the following resolution was unanimously adopted:

"Resolved that the members of the Board of Directors of this company have read with much interest the news items and editorials which have recently appeared in the press generally throughout the Piedmont Section of the Carolinas, and other places, with reference to Mr. Duke being urged to construct additional lines of railroad or extensions, to the present lines of the company, and the general expressions of the great benefits and advantages that would accrue, and the general upbuilding of the Piedmont Section of the Carolinas, and the development of its resources which would result from the construction of additional lines of railroad or extensions of the lines of this company, and are (178) heartily in accord with the expressions which have been made by the public generally, in regard to the construction of such additional lines of railroad or extensions, and hereby pledge to Mr. Duke our fullest cooperation in the construction of any additional lines of railroad or extensions of the system of this company which he may deem advisable to make."

There was no reference to extension in the minutes of meetings between April 29, 1924, and August 11, 1925. The next mention of extension is in minutes of meeting

of January 26, 1926, where the following minute occurred:

"Mr. E. Thomason, Vice President and General Manager, presented to the meeting report of the operations of the property and business of the company during the year ended December 31, 1925, and discussed the question of extension of the lines of the company, referred to in minutes of meeting of directors held on August 11th, 1925."

At a meeting on January 6th, 1926, a resolution was adopted in memory of Mr. Duke who had died October 10th, 1925.

The next minute in reference to extension is at a meeting on November 3rd, 1926:

"Special meeting of Directors.

"Mr. Lee recited the history of the organization of the company and the construction of its lines of railway, and recalled that it was the intention of the late Mr. James B. Duke and his associates, in organizing the Company, that its main line of railway should extend through the Piedmont Section of the Carolinas from Greenwood, South Carolina, to Durham, North Carolina, with such additional lines as might be necessary or desirable for the development of the resources of this section, and related events which had transpired since the link between Greenville and Spartanburg had been completed. Mr. Lee stated that it was not until shortly before Mr. Duke's death which occurred on October 10, 1925, that Mr. Duke and the directors of the corporation were again able to take up plans for the completion of the road. He explained surveys for further extensions that were made in the summer of 1925 and that since the death of Mr. Duke the work of completing preliminary plans up to the point where construction work could be resumed had been continued as rapidly as the circumstances brought about by the death of Mr. Duke would permit, and stated that plans had been completed to the extent that further construction work might be com-
(179) menced and that the meeting was called for the

purpose of submitting the matter to the directors for their consideration and action, and to provide for the construction of extensions if, in the opinion of the directors, it was advisable or desirable so to do. The matter was thereupon discussed generally by all the directors present.

"Upon motion of Capt. E. A. Smyth, duly seconded by Mr. C. E. Hutchison, the following preambles and resolution were unanimously adopted:" (Being the resolutions set forth in Exhibit 28 hereinbefore copied in full.)

The next mention of the amendment to the charter is made in minutes of stockholders' meeting December 8, 1926, at which a resolution was adopted authorizing the directors to construct extension from Spartanburg to Gastonia, and an extension of the line in North Carolina from Charlotte in a northerly direction to such points as the directors deem advisable, with authority ultimately to extend the line to Durham, and also to amend the charter eliminating the ten year restriction proviso in Section 2.

At a meeting of the directors, March 21st, 1927, the president reported the charter had been amended in accordance with the resolution of the directors and stockholders at their meetings on November 3rd and December 8th, by act of the General Assembly, approved by the Governor on January 27th, 1927. The next reference to an extension of the lines is in the minutes of directors' meeting March 21, 1927, at which there was a general discussion of the correspondence had between the Company and the Interstate Commerce Commission as to necessity of filing an application for the proposed construction, and a resolution was adopted authorizing the officers to take the matter of the application up with the Commission and make such application as shall be deemed necessary. This was on March 21, 1927.
(180) The matter was next mentioned at a meeting of the directors on May 4th, 1927, where the minutes state that President Lee discussed the status of the application filed with the Commission. The matter is next mentioned in minutes of meeting July 27, 1927, which state

that Mr. Lee reported a hearing of applications before the Interstate Commerce Commission Examiner. On October 26, 1927, at a meeting of the directors, the President explained the status of the application before the Commission and stated that Judge Charles E. Hughes of New York City had been employed as Special Counsel in connection with the company's original plan of building its lines to Winston-Salem and Durham, North Carolina. The next mention of extension in the minutes is at meeting of directors April 25th, 1928, at which the report of the Interstate Commerce Commission denying the defendant's application was presented by the President of the Company. Resolution was passed authorizing the officers to institute legal proceedings in order that the Company might construct its lines as originally planned. The next mention is made in the minutes of the meeting of October 21st, 1928, at which the status of the suit upon the question of the jurisdiction of the I. C. C. was explained by the President of the Company. The next mention is at a meeting March 26, 1929, when the status of the case in the Supreme Court was explained by the President, and the same refernece is made in the minutes of the meeting of October 30, 1929, and January 29, 1930.

The minutes of special meeting of directors March 10, 1930, states that the entire opinion of the Supreme (181) Court of the United States, filed February 24, 1930, in case of Piedmont & Northern Railway Company vs. United States, Interstate Commerce Commission, et al., was read. The minutes then contained the resolution which is Commission's Exhibit 1 heretofore introduced.

The minutes of the meeting of March 26, 1930, contain the following entry:

"Mr. Lee discussed with the directors the progress of the work in the completion of the line of the Company and stated that work was going forward with dispatch in both North Carolina and South Carolina. Mr. Lee read to the meeting a letter which he received from the Interstate Commerce Commission, acknowledging the receipt of its letter with which he sent to the Commission a certified copy of the resolution adopted

at the special meeting of the Board of Directors of the Company, held on March 10, 1930, directing the officers of the Company to proceed towards the completion of the lines of the company as originally planned and projected and in which he advised that work in completion of the lines had been commenced."

The above is the last minute in the book in reference to the question of extension.

The records of the Company show expenditures charged on its books in the proposed extension of its lines: "Statement of cost of proposed extension of January 31, 1930, May 11, 1911, to December 13, 1913, incl., $2,435.26. April, 1915, to May, 1916, incl., $1,898.02. May, 1925, to January, 1930, $565,357.74. Total, $569,-691.02." I did not check the figures for the years 1911 to 1913.

I prepared statement showing amount expended in connection with extension during each year from 1925 to 1929 which cover a survey from Charlotte, North Carolina, to Lexington, during 1925 and 1926, and in those two years show a total expenditure of $65,574.02. Statement shows total expended at the close of years 1927, 1928 and 1929 on the so-called two extensions. They (182) set up in their books suspense accounts showing the amounts charged to the extension from Gastonia to Spartanburg, and the extension from Charlotte to Winston-Salem; the amounts above referred to for the years 1925-1926 are in connection with the Charlotte-Winston-Salem extension; that amount was orignally in connection with the Charlotte to Lexington extension and the name was subsequently changed to the Winston-Salem extension. At the end of December, 1926, the total expended on the Gastonia to Spartanburg extension, excluding the amount of $1,898.02 expended in 1915 and 1916, was $100,410.58.

As of December 31, 1928, total expenditures on the Gastonia to Spartanburg extension, $131,948.19; at the close of 1929, $161,770.40. At the end of December, 1927, total expended in connection with Charlotte to Winston-Salem extension, $314,727.83; at end of December,

1928, total on this extension $360,417.27; at end of December, 1929, the total expended on this extension was $401,021.59. The grand total as of December 31, 1929, was $562,791.99, excluding the $1,898.02 expended in April, 1915, and May, 1916, and the $2,435.26 that was expended prior to 1931. There were no amounts charged to these extensions from 1916 up until 1925. Statement of cost of proposed extension for five years ending December 31, 1929, is the Commission's Exhibit 64.

I have statement of the amounts expended in December, 1929, and also the total up to that date; also similar statements for January, February and March, 1930. These statements show the amounts expended for the Charlotte to Winston-Salem and for the Gastonia to (183) Spartanburg extension, and it shows them by the accounts as prescribed by the Interstate Commerce Commission, accounts for engineering, right-of-way, grading, paving underpasses, interest on funds used for construction, injuries and damages, taxes, miscellaneous. Statement of costs as of December 31, 1929, and for costs during the month of December, 1929, is the Commission's Exhibit 85. Statement of charges for January, 1930, is the Commission's Exhibit 86. Charges for February, 1930, is Commission's Exhibit 87, and charges for March, 1930, is Commission's Exhibit 88.

Exhibit 89 is statement of charges for the years 1915, 1916, total of $1,898.44, all charged to engineering. In connection with survey of proposed extension Gastonia to Kings Mountain during the year 1916, shows items paid to expenses, salaries of engineering forces.

I did no investigating as to expenses prior to years 1915 and 1916. There is no record of expenses in connection with the proposed extension during the years 1917 to 1924, inclusive. Exhibit 90 is statement of cost of proposed extension to January 31, 1930, as of memorandum dated March 10, 1930, that was in the files of the General Manager. This showed statement of cost of proposed extension to January 31, 1930; May 11, 1911, to December 13, 1913, inclusive, $2,435.26; April, 1915, to May, 1916, inclusive, $1,898.02; May, 1925, to January, 1930, $565,357.74; total, $569,691.02.

Commission's Exhibit 91 is copy of statement we found in the office of the Auditor of the Piedmont and Northern, cost of extension file, which shows expendi-

tures for engineering, right-of-way, paving, interest, miscellaneous expenses and total from 1915 to April 30, (184) 1927, inclusive. Shows cost of survey, Gastonia to Kings Mountain, 1915, 1916, engineering, $1,898.44, as the total expenditure in connection with that particular project. The next item is expenditure made by E. Thomason in connection with proposed extension and is the expenditure made by Mr. Thomason during the years 1925 and 1926, and agrees with the figures shown for those years in Exhibit 84, to which must be added $4,590.11, interest on funds. This shows charge to engineering, $56,012.99; right-of-way, $1,118.41; miscellaneous, $5,852.51; total, $62,983.91. To this is added interest, $4,590.11, making total charge to Charlotte to Winston-Salem extension for 1925 and 1926, $67,574.02. The next item on the statement is amount expended January and February, 1927, $9,750.67 to engineering; $50,500 to right-of-way; $738.82, paving; $4,590.11, interest; $41.40, miscellaneous; total, $65,621.00. The next item, amount expended March 27th to April 30th, 1927, to engineering, $38,376.34; right-of-way, $47,777.26; miscellaneous, $6,485.71; total, $92,639.31; and the total up to and including April 30, 1927, of engineering, $106,038.44; right-of-way, $99,395.67; paving, $738.82; miscellaneous, $12,379.62; total, $223,142.66.

The Commission's Exhibit 92 is statement of cost of extension to May 31, 1927, taken from the extension file of the Auditor of the Piedmont and Northern; shows amount spent prior to January, 1927; engineering, $56,012.99; right-of-way, $1,118.41; interest on funds used for extension, $4,590.11; miscellaneous, $5,852.51; total, $67,574.02. Amount spent January 1, 1927, to May 31, 1927; engineering, $63,300.67; right-of-way, $103,986.62; paving, $738.82; miscellaneous, $11,194.64; total, $179,(185) 920.72; grand total, $247,494.74. This statement was transmitted by the Auditor to the Chief Engineer, which letter stated that a statement of costs of extension to May 31, 1927, divided between expenditures prior to January 1, 1927, and subsequent thereto, is being enclosed. Attached to this is copy of reply, dated July 16, 1927, from the Chief Engineer to the Auditor, acknowledging receipt of a statement of costs of extension to

May 31, 1927. These two letters are attached to and made a part of the Commission's Exhibit 92.

The P. and N. opened a suspense account in January and February, 1927, for the amounts expended by Mr. Thomason on extension in 1925 and 1926, plus interest of $4,590.11 on funds advanced; this was charged on the books to the expense account "Charlotte to Lexington Extension Account", which was opened in January, 1927. In September, 1927, this account was changed to "Charlotte to Winston-Salem Extension"; a similar extension account "Gastonia to Spartanburg Extension" was opened in February, 1927. The opening of these accounts was in accordance with the prescribed method of accounting promulgated by the Interstate Commerce Commission.

CROSS EXAMINATION.

In making up the statement (Exhibit 70) of carload and less than carload shipments, all the textile tonnage, irrespective of whether they were carload or less than carload, was included under carload. The records of the Company did not divide textile shipments between carload and less than carload, and all textile shipments are shown as if they were carload shipments. Exhibit 70 (I86) shows for 1928, 90,564 tons of textile; for 1929, 99,386 tons, and for two months of 1930, 15,506 tons. I can not say how much of that was carload and how much was less than carload. This could be determined, but it required so much work I did not have time or assistance to carry it on.

Exhibit 76 is statement of movement of freight trains on the P. and N. on March 1, 1930. I can not say that the movement of trains on that day is fairly representative of the usual and customary manner in which freight trains are moved by the P. and N.; the day was selected at random; I assume that it was representative.

On Exhibit 76 the trains marked with an "X" indicate an extra train and not a regular train shown on the time table, which time tables are Exhibits 78 and 79, and show only the regular and not the extra freight trains. On March 1, 1930, there were moved over the P. and N. 14 extra freight trains; the train on that list with the largest number of cars was X5100, Train No.

47, from Spartanburg to Greenwood; it arrived at Greenwood with 60 cars; left Spartanburg with 6 loaded and 14 empty. It arrived with two motors; left Spartanburg with one.

From Exhibits 76 and 77, I would say that these particular trains were operating in somewhat of a local service rather than a through movement.

Any kind of railroad operated by any kind of motive power, whether it is steam, interurban, suburban or street railroad, if engaged in handling of freight, general transportation of freight under the Interstate Commerce Act, is required to file tariffs with the Interstate Commerce Commission. Other electric railroads, as well as the Piedmont and Northern, have contracts with the (187) American Railway Express Company, or its successor for the handling of express. All railroads operated by electricity, or any other motive power, whether they be steam roads, street or suburban railroads, are required to file powers of attorney and concurrences, and concur in tariffs if they propose to and do handle freight in interstate commerce. Other electric railroads are parties to joint rates with steam railroads.

Exhibit 83 shows that the P. and N. filed with the Southern Freight Association rate proposals as follows: During 1926, it filed 42; in 1927, 62; in 1928, 44; in 1929, 34; in 1930, 21; total 205. During 1926, I think that the total proposals of all railroads of that association was approximately 10,000, that is, 10,000 docket advices. I don't know whether that would account for all of the rate proposals filed or not. There would be more proposals filed than there would be docket advices unless all of the proposals were acted upon. Rate proposal means that if a shipper offers a shipment to the Piedmont and Northern moving from some point on its line to some point off of its line, and there is no rate on file covering that shipment, or no route, then the P. and N. would file a proposal for a rate or a route. A rate proposal would also cover changes in rates requested by shippers, changes in classification, etc. The number of proposals that a railroad would file would depend upon the service it was called upon to render by shippers, very largely.

I have no information at hand as to the amount expended by the Piedmont and Northern for equipment

prior to June, 1914. I said the freight cars of the P. and (188) N. had no electrical equipment; all freight cars that I know of that are interchangeable with steam railroads have no electrical equipment. All electric railroads that I know of which handle freight cars, handle them by means of electric locomotives or motors. I have never seen an electrically equipped freight car. On redirect examination Mr. Marsh stated that he had had occasion to investigate two or three electric railways several years ago on the question of their filing tariffs and found that they had done so. I have no information as to the number of railroads which file proposals to the Southern Freight Association.

The Commission's Exhibit 93 is a list of the stockholders of the capital stock of the defendant in the amount of 100 shares and over, as of March 31, 1930; also, the total number of shares of outstanding stock and the total number of shares held in blocks of less than 100, and the total number of shareholders, which exhibit is as follows:

| Name | Address | No. Shares |
|---|---|---|
| Jose Gomez Acebo, | Madrid, Spain, | 100 |
| George G. Allen, (Vice President) | 535 Fifth Avenue, New York City. | 576 |
| John H. Andrews, | Raleigh, N. C. | 100 |
| John E. Baker, | Zork, Pa. | 200 |
| Harry Payne Bingham, | First National Bank, New York City. | 1,000 |
| Mrs. Elizabeth B. Blossom, | Cleveland, Ohio, | 1,000 |
| Ernest S. Booth, | Durham, N. C. | 100 |
| Alfred J. Boyan, | c/o Central Union Trust Co., 80 Broadway, N. Y. C. | 816 |
| A. H. Burroughs, (deceased) | New York, | 461 |
| Chiquola Mfg. Co., | Honea Path, S. C., | 102 |

| (189) Name | Address | No. Shares |
|---|---|---|
| Citizens Saving & Trust Co., | Cleveland, Ohio, | 1,000 |
| Cleveland Trust Co., | Cleveland, Ohio, | 1,000 |
| Mary B. Cocke, | Charlotte, N. C. | 100 |
| Edmund P. Coles, | Charlotte, N. C. | 100 |

| | | |
|---|---|---|
| Frederic W. Cone, | Baltimore, Md. | 180 |
| Continental Investing & Realty Corp., | New York, | 600 |
| Frank H. Cothran, Ex-(Chief Engineer) | Prov. of Quebec, Canada, | 100 |
| Stuart W. Cramer, | Cramerton, N. C. | 100 |
| Miss Mercedes de Castellanos, | Madrid, Spain, | 400 |
| Daniel C. DeVine, | Zork, Pa., | 150 |
| Duke Securities Corp., | Charlotte, N. C., | 10,090 |
| Estate of Angier B. Duke, deceased, | 535 Fifth Ave., N. Y. C. | 250 |
| City Bank Farmers Trust Company, Trustees for Anthony N. Duke U/W of Angier B. Duke, | 22 Williams St., N. Y. C. | 250 |
| The Trustees of the Duke Endowment & Trust Established James B. Duke by Indenture dated 12/11/24, | 535 Fifth Ave., N. Y. C., | 19,031 |
| Trustees of the Trust Established by Will of Jas. B. Duke for Nanaline H. Duke and Doris Duke, | 535 Fifth Ave., N. Y. C., | 9,515 |
| Nanaline H. Duke, 1st Successor Trustee for Doris Duke under Trust Indenture dated 9/4/27, | 535 Fifth Ave., N. Y. C. | 3,301 |
| C. C. Dula, | 212 Fifth Ave., N. Y. C., | 1,200 |
| Grover C. Dula & Guaranty Trust Co. of N. Y., Exec. U/W of Josephine Carr Dula, | 524 Fifth Ave., N. Y. C. | 800 |
| Grover C. Dula & Guaranty Trust Co. of N. Y., Trustees under will of Josephine Carr Dula, | 524 Fifth Ave., N. Y. C. | 100 |

| (190) Name | Address | No. Shares |
|---|---|---|
| Grover C. Dula, | 17 E. 45th St., N. Y. C. | 100 |
| Mrs. Anna S. Eader, | York, Pa., | 100 |
| Iva Edgar, | St. Louis, Mo., | 100 |
| Augustus A. Eshner, | Phila. Pa., | 190 |
| Carey E. Etnier, | York, Pa. | 1,000 |

| | | |
|---|---|---|
| The Fidelity Bank, | Durham, N. C., | 175 |
| Fort Orange Chem. Co., | Albany, N. Y. | 298 |
| Jones Fuller, | Durham, N. C. | 899 |
| Thos. S. Fuller, | New York, | 250 |
| W. W. Fuller, | Briarcliffe Manor, N. Y., | 2,000 |
| Adam J. Glossbrenner, | York, Pa., | 100 |
| Hattie S. Grant, | Atlanta, Ga., | 200 |
| William H. Hall, | York, Pa., | 500 |
| Halsted & Harrison, | New York, | 1,675 |
| E. Baynard Halsted | New York | 250 |
| Basil Harris | New York | 300 |
| Gordon Harris | New York, | 300 |
| Ieuan Harris | New York | 240 |
| Harrison & Co., | Philadelphia, Pa., | 624 |
| J. M. W. Hicks, | New York | 300 |
| Mrs. Annie Watts Hill, | Durham, N. C., | 1,500 |
| John Sprunt Hill, | Durham, N. C., | 100 |
| George C. Hochwalt, | York, Pa., | 100 |
| George C. Holton | New York, | 100 |
| George A. Jessop, | York, Pa., | 100 |
| William A. Keyworth, | York, Pa., | 100 |
| Sybil Harris King, | Irvington on Hudson, N. Y. | 300 |
| W. S. Lee, President, | Charlotte, N. C., | 520 |
| Linden Investment Corp. | 535 Fifth Ave., N. Y. C. | 5,500 |

| (191) Name | Address | No. Shares |
|---|---|---|
| Marlee Investment Corp., | Charlotte, N. C., | 1,360 |
| Mrs. Sara E. Morrison, | Charlotte, N. C., | 1,500 |
| George S. Munson, | Phila., Pa., | 750 |
| Joseph E. O'Toole, | Washington, D. C., | 100 |
| George H. Palm, | New York, | 819 |
| Pearson Investment Corp. | 535 Fifth Ave., N. Y. C. | 280 |
| Belva Dula Pieri, | New York | 100 |
| Harry E. Popp, | Boston, Mass., | 100 |
| Marguerite A. Ravenel, | Greenville, S. C., | 172 |
| E. Stuart Rains, | Phila., Pa., | 100 |
| Rough Point Investment Corporation, | 535 Fifth Ave., N. Y. C. | 2,463 |
| John M. Scott & Co., | Charlotte, N. C., | 100 |
| Frederic W. Smith, | Newark, N. J., | 471 |
| Forest D. Stout | Greenville, Pa., | 100 |
| Harold Syvertsen, | York, Pa., | 100 |
| E. Thomason, Vice Pres., and General Mgr., | Charlotte, N. C., | 144 |
| Miss Lalla Thomason, | Charlotte, N. C., | 100 |

| | | |
|---|---|---|
| Wallace & Company, | New York, | 1,016 |
| Nevin M. Wanner, | York, Pa., | 100 |
| Carl F. Wettergreen, | New York, | 917 |
| George H. Whiteley, | York, Pa., | 200 |
| Joseph O. Whiteley, | York, Pa., | 500 |
| John F. Wily, | Durham, N. C., | 100 |
| T. B. Yuille, | New York, | 120 |
| Total—82 | | Total—82,355 |

| | |
|---|---|
| Total number of shares of stock issued and outstanding | 85,841 |
| Total number of shares of stock held in blocks of 100 or over | 82,355 |
| (192) Total number of shares of stock held in blocks of less than 100 | 3,486 |

| | |
|---|---|
| Total number of shareholders | 415 |
| Total number of holders of shares of stock in blocks of 100 or over | 82 |
| Total number of holders of shares of stock in blocks of less than 100 | 333 |

Exhibit 97 is letter from E. Thomason, Vice-President of the defendant, to N. W. Storer, Westinghouse Electric and Manufacturing Company, Pittsburgh, Pa., dated June 15, 1925, asking Mr. Storer to make a layout for an 85 mile extension as soon as practicable, showing overhead construction, substation layout, and locomotive for trailing load of 1,800 to 2,000 tons, or 35 to 4,000 tons in multiple, maximum grade not to exceed 1 per cent and no curvature in main line to exceed six per cent, about 80 to 85 per cent tangent, and laid with 100-pound rail.

Exhibit 98 is letter to N. W. Storer, Westinghouse Electric and Manufacturing Company, from E. Thomason, dated June 25, 1925; states that the P. and N. is now locating a line North of Charlotte; is the purpose to build first to Lexington, and a branch to Winston-Salem; the general scheme, of course, being to eventually work out a line to Durham; have been considering 2,000-ton locomotives, and in extreme cases, using two units in multiple control for heavy coal trains; for lighter serv-

ice, one locomotive to be used per train unit. Appreciates that a double trolley for heavy service will be necessary; is figuring on using concrete poles.

Exhibit 99 is letter from E. Thomason to N. W. Storer, dated September 26th, 1926; states that he has (193) heretofore sent profile of proposed extension, Charlotte to Lexington; asks for information as to what is being done toward giving layout for electrification, substations, and approximate cost.

Exhibit 100 is letter dated March 20, 1926, from Supervising Engineer of the Interstate Commerce Commission, to E. Thomason, stating that he had seen in the "Engineering News-Record" notice of purpose of the P. and N. to extend its lines from Charlotte to Winston-Salem, 75 miles, and asks that copies of contracts and final estimates be furnished the Commission as soon as available;-also, as a part of the exhibit, letter from Mr. Thomason to Supervising Engineer of the Commission, Bureau of Valuation, dated March 29, 1926, in which Mr. Thomason states that there is nothing definite as to the proposed extension from Charlotte to Winston-Salem. If it is decided to build this, and the contracts are awarded, the matter will at that time be taken up with the Engineer.

Exhibit 101 is letter dated June 17, 1926, from Rand-McNally and Company to J. S. Cureton, Traffic Manager, Piedmont and Northern, stating that the writer has certain information concerning extension of the P. and N., and asks for complete information, including blueprints and location of stations, etc., for contemplated extension from Charlotte to Winston-Salem. Part of the exhibit is letter from Mr. Thomason to Rand-McNally Company, dated June 24, 1926, in which he states that the people in this vicinity agitated the question of extending the lines to Winston-Salem, and in connection with lines between Gastonia and Spartanburg, but that nothing had been done on the matter up to this time.

(194) Exhibit 102 is letter dated July 22, 1925, from P. W. Early to E. Thomason, Vice-President and General Manager, asking that he be furnished copy of specifications for electric locomotives for proposed extension for use in computing bridges. A part of the exhibit is reply from Mr. Thomason to Early, dated July 27, 1925,

saying he is unable to furnish specifications of electric locomotives for sometime. These bridges should not be less than Cooper E-55 loading. "We, of course, want the bridges of sufficient capacity to take care of future needs, and suggest you work up specifications on the same class of loadings as the Southern Railway has on its recent double track construction through this territory."

Exhibit 103 is letter from American Telephone and Telegraph Company, dated November 30, 1926, to Piedmont and Northern Railway, Charlotte, stating that the Electrical World of November 13th contained a news item regarding proposed installation of several substations in connection with extension of electric railway to Gastonia, and also from Charlotte to Durham; asks for information as the proposed electrified railway will parallel or cross lines of the Telephone Company. Part of the Exhibit is Mr. Thomason's reply, dated December 1, 1926, which states that the matter of the proposed extension had not been definitely decided, but that he would be glad to take the matter up with the Telephone Company if it be decided to go through with the extension.

Exhibit 104 is letter dated December 27, 1926, from Mr. Thomason to O. M. Mull, Shelby, N. C.; states that (195) the extension of the P. and N. was located some years ago between Gastonia and Kings Mountain; that no survey has been made between Kings Mountain and Spartanburg, and that every consideration will be given to the location between these points before the question has been definitely determined.

Exhibit 105 is a letter dated March 25, 1930, from Chamber of Commerce, Winston-Salem, to W. S. Lee, President, Piedmont and Northern Railway Company, as follows:

"Dear Mr. Lee:

"Of course, it is needless to reiterate our interest in the plans of the Piedmont and Northern Railway to extend its lines. We are watching developments with much interest.

"Within a few days our Executive Committee of our Directors will meet and I am writing to ask if there is anything that we might do at this stage of the game

that will be helpful. If so, we shall be glad to have you advise.

"With kindest personal regards,

"WM. T. RITTER, Secretary."

Part of Exhibit 105 is Mr. Lee's reply, dated March 27, 1930, as follows:

"My dear Mr. Ritter:

"I have your favor of March 25th regarding Piedmont and Northern Completion of its lines into Winston-Salem. I wish to thank you and your associates for your kindness in this, but I do not know of anything (196) just at the moment you can assist us on. I shall be very pleased to advise you if anything comes up and will appreciate your assistance at any and all times. It is our purpose to continue our efforts to complete this line as we are quite sure that it will be of great use and benefit to the entire community.

"Again thanking you and with kindest regards, I am,

"Respectfully yours,

"W. S. LEE, President."

Exhibit 106 is letter from E. Thomason to J. L. Graham, Chairman, Transportation Council, Chamber of Commerce, Winston-Salem, N. C., dated September 2, 1925, which states that when he first brought up the question of building into Winston-Salem to Mr. Duke, Mr. Duke asked him to confer with the Reynolds Tobacco Company and if it was decided to build, it must be done in co-operation with the Reynolds interests; he realizes Mr. Graham's interest in the situation; is extremely anxious that every inducement that can possibly be offered be laid before Mr. Duke when it comes to making the final decision as to building the road, and anything that you and your interests may do to this end will have great weight with him. The further I go, the more hopeful I am of getting the road built.

Exhibit 107 is letter dated January 31, 1927, written by Mr. Thomason to Miss Floy Sarratt, Gaffney, S. C.;

replies to her letter of the 24th; states that, of course, (197) he can not give any information about her property. Has no idea, if the road is located through Gaffney, just where it will run; question of buying rights-of-way and terminals will be taken up after this has been done.

Exhibit 108 is letter from Mr. Thomason to R. C. Belk, Mt. Holly, N. C., dated March 29, 1927, replying to Mr. Belk's letter of the 25th; says that the line has not yet been located between Kings Mountain and Gaffney, and until this is done he can not give any definite information about the location of the crossing at Broad River.

This concluded the evidence of the Interstate Commerce Commission in chief.

## EVIDENCE OF THE INTERVENERS.

Interveners, on motion, were granted the right to adopt the evidence introduced by the Commission and to make such evidence their evidence.

B. HERMAN, a witness on behalf of the interveners, testified that he was Chief Engineer of the Southern Railway; was graduated at the Massachusetts Institute of Technology in civil engineering in 1899; worked for a year with the American Bridge Company; then employed by the Baltimore & Ohio Railroad as a draughtsman; came with the Southern Railway in 1900 and has since been in its service; started as Assistant Engineer in the Bridge Department and worked up through various grades to the position now held by him. Prior to the hearing of the proceedings before the Interstate Commerce Commission in 1927, he made personal investigation and observation of the lines of the P. and N.; at that time the investigation was principally devoted to (198) locating the line with reference to the lines of the Southern Railway between the present lines and the proposed lines, and at that time he made a series of maps or graphs showing the transportation system of the territory through which the P. and N. operates. That since that time he has again reviewed the transportation system of that territory; has prepared a large railroad map of North and South Carolina; in his 30 years of experi-

ence as a railroad engineer he is familiar with locations of railroads in this territory, and the map which he has prepared is correct.

On this map the Southern Railway lines are shown heavy; they run approximately from Danville through Greensboro, Salisbury, Charlotte, Spartanburg, Greenville, and on to Atlanta, that being a double track main line. Shows the lines from Greensboro through Winston-Salem to Wilkesboro, from Wilkesboro around Mocksville to Charlotte, from Statesville to Taylorsville, from Salisbury through to Asheville and on to Knoxville, from Spartanburg to Asheville, from Blacksburg to Marion, from Greensboro to Goldsboro; through Durham and Raleigh, from Charlotte to Columbia, from Blacksburg to Kingsville, from Spartanburg to Columbia, from Columbia to Augusta, Charleston to Augusta; from Greenwood to Greenville. There is a line from Greenville through Greenwood to Ashton, adjoining the Spartanburg-Columbia line, and in to Columbia. It is a single track from Greenwood to Columbia; the line from Greenville to Spartanburg is a part of the double track line between Washington and Atlanta, which continues on to Gastonia and Charlotte.

(199) Between Charlotte and Winston-Salem, the Southern has practically a through line by Mooresville, Barber and Mocksville; also a line from Charlotte to Greensboro; also we could come from Charlotte to Salisbury to Barber and Winston-Salem.

The map shows the line of the Winston-Salem Southbound, which starts at Winston-Salem, goes to Lexington, Albemarle, and Wadesboro; this connects Winston-Salem and Lexington with the Southern Railway, which is an available line from Winston-Salem to Charlotte, first from Winston-Salem to Lexington, then via the Southern Railway to Charlotte. The Winston-Salem Southbound is owned one-half by the Coast Line and one-half by the Norfolk and Western. The Norfolk and Western runs from Winston-Salem to Martinsville, Virginia, and then on to Hagarstown, a gateway where a connection is made with the Pennsylvania, and then north and east, Maryland, Pennsylvania, New Jersey, New York, West Virginia, New England. The Norfolk and Western physically connects with the Winston-Salem

Southbound at Winston-Salem, and also with the Southern.

I have another map that is colored and same as the former map showing the Seaboard Air Line road. It shows Raleigh from where the Seaboard Air Line comes from Henderson to Raleigh, Sanford, Aberdeen, Cheraw, Camden, Columbia and on to Savannah; has a branch which runs from Hamlet to Monroe, Chester, Elberton and on to Atlanta; has a branch from Hamlet to Dillon and on to Charleston and from Charleston to Savannah and then into Florida. The Seaboard goes on the East Coast to Miami, and well down on the West Coast, and it extends North to Richmond.

(208) The Southern Railway System is a trunk line railroad through the terirtory of the Southeast; the Seaboard is also a trunk line through the Southeast. The Seaboard runs from Charlotte to Monroe where it connects with the Atlanta line, and extends westwardly to Lincolnton, Shelby and Bostick, there being a line from Lincolnton to Charlotte and on to Monroe, then to Wadesboro, where it connects with the Winston-Salem Southbound; it goes to Rockingham and Hamlet, then northward to Raleigh and Richmond. This line crosses the Norfolk-Southern at Aberdeen and also crosses the Aberdeen and Rockfish; has connections at Aberdeen with the Norfolk-Southern and the Aberdeen and Rockfish. At Sanford it connects with the Atlantic & Yadkin, and with the Atlantic & Western and the Atlantic Coast Line and the Norfolk-Southern. It crosses and connects with the Norfolk-Southern at Bonsal, with the Durham Southern at Apex; it crosses the Southern at Cary; at Raleigh it connects with the Southern and the Norfolk-Southern. From Raleigh it goes through Henderson and on to Richmond.

The Seaboard has a connection with the Durham-Southern at Apex; the Durham-Southern leads from Apex to Durham and also from Apex to Varina, where it connects and crosses the Norfolk-Southern; from there it goes to Dunn and connects with the Atlantic Coast Line. The Durham-Southern is a steam railroad; it carries all kinds of freight, including interstate freight. The Seaboard Air Line that runs through Greenwood is the main line betwene Atlanta and the North, and leads on by itself, or connections, to Norfolk and beyond. The.

(201) Seaboard Air Line has a line from Charlotte to Monroe, where it connects with its main line. It is a steam railroad.

The Norfolk-Southern is a steam railroad. It goes to Charlotte, then to Norwood where it connects with the Yadkin Railroad, and crosses the Winston-Salem Southbound. The Atlantic & Yadkin runs from Mt. Airy to Sanford through Greensboro. The Norfolk-Southern crosses the Southern at Colon; from Duncan it has a line that runs to Durham, and runs eastwardly to Varina where it connects with the Durham-Southern. The Norfolk-Southern runs from Varina to Raleigh, thence eastwardly to Wilson where it connects with the Atlantic Coast Line; then runs to Farmville where it connects with the Eastern Carolina, then to Greenville to a connection with the Atlantic Coast Line; then on to Washington, N. C. It also runs to New Bern where it connects with the Atlantic Coast Line; it runs on to Kinston and Goldsboro where it connects with the Atlantic Coast Line; it also connects with the Atlantic Coast Line at Washington and at Plymouth, and runs on to Edenton and to Suffolk. The Norfolk-Southern has a through line from Charlotte through to Norfolk.

The A. C. L. Railroad starts at Emporia, Virginia, goes through Weldon, North Carolina, Rocky Mount, Fayetteville and on to Charleston, South Carolina, Savannah and on to Florida; on the North it goes to Norfolk; it has a line to Wilmington, and to Florence and from Wilmington to Fayetteville and to Sanford; from Florence to Charleston and from Florence to Columbia; it is a network there. It constitutes an important through trunk line leading southwardly and northwardly (202) through the Southeastern part of the United States and Florida, to Virginia through Georgia, North and South Carolina.

This map is the interveners' Exhibit 1. On it is shown the existing P. and N. lines in heavy solid red lines; they start from Greenwood and go to Belton, Williamston, Piedmont, Greenville and on to Spartanburg. The red line correctly shows the proximity of the line to the line of the Southern Railway. The map shows the line from Belton to Anderson, which is referred to in the pleadings as a branch line. In North Carolina the map shows by a red line the existing line of the P.

and N.; the coloring on the line is not in the scale; the P. and N. line is along the middle of the wide red band on the map approximately. The dotted heavy red line from Spartanburg to Gastonia is the proposed extension of the P. and N., as described in its application to the Interstate Commerce Commission. The dotted lines from Charlotte to Winston-Salem are the two routes described in the application to the Interstate Commerce Commission and in the answer to the questionnaire for the extension between Charlotte and Winston-Salem; they are marked "A" and "B"; "A" practically parallels the Southern all the way to Lexington and then the Winston-Salem Southbound; "B" is the shorter line making a direct cut, and is the line the P. and N. stated would be built in the supplement to the answer to the questionnaire; in other words they adopted the more direct route.

At Greenwood the P. and N. connects with the S. A. L.; from its Atlanta line it goes northwardly through Columbia to Richmond and to its Northern gateway. At Greenwood the P. and N. has no direct physical tracks connecting with the Georgia and Florida and the C. and W. C., except over Seaboard's tracks, but interchanges (203) with these roads through the Seaboard as an intermediate switching carrier.

The C. and W. C. runs through Greenwood northwardly to Greenville and Spartanburg and southwardly to Augusta and eastwardly to Charleston; at Spartanburg it has a connection with the Southern and with the P. and N.; and through the Southern it has an intermediate switching line with the Carolina, Clinchfield and Ohio, which latter road runs northwardly to Johnson City and then on to Bostick and Elkhorn City to a connection wtih the C. and O., and has a northern gateway with the C. and O.

The Georgia and Florida, the Seaboard, the C. and W. C., and the Southern run into Greenwood. The Georgia and Florida comes from Augusta and runs thence southwardly into Georgia where it has a number of branch lines spreading out; it would connect with the Central of Georgia at Augusta. While not shown on the map, it extends to Madison, Florida on the South; the southern point shown on the map of the Georgia and Florida is Vadalia; the Southern terminus of the Georgia

and Florida is Madison, Florida, and the Northern terminus is Greenwood. Intervener's Exhibit 1 correctly represents the network of other railroads South of South Carolina and in South Carolina.

I present another map similar to Exhibit 1, but on a scale half as large. It is a correct geographical representation of the territory shown and the railroads in it. The original of the map was made in 1927 before the Georgia and Florida was completed and in operation, so it was shown in pencil on the map; it is now constructed and in operation between Augusta and Greenwood, as (204) represented by the pencil line; it is a steam road engaged in interstate commerce. On the right of the map is a legend which reads "The Piedmont and Northern Railway present lines are shown in cross-hatched light black line. The Piedmont and Northern proposed new lines in light dotted black; Southern Railway System in heavy black solid; the Atlantic Coast Line, blue; Seaboard Air Line in yellow; the Charleston & Western Carolina in brown; the Carolina, Clinchfield & Ohio in violet". This is the intervener's Exhibit 2.

Intervener's Exhibit 3 is a smaller map similar to *Exhibit* 2 on which is drawn three sets of concentric circles, each set composed of two circles of 10-mile and 20-mile radius respectively. The southernmost set has its center approximately between Gastonia and Kings Mountain on the proposed P. and N. The middle set has its center approximately half way between Charlotte and Kannapolis, and the northernmost set has its center approximately midway between Spencer and Winston-Salem. The map with the circle shows the relative proximity of the proposed lines of the P. and N. to other roads in the territory, and otherwise it is identical with Intervener's Exhibit 2.

Intervener's Exhibit 4 is map showing highways in territory in which the P. and N. proposes to build its extension. It runs from Spartanburg to Greensboro and Winston-Salem and vicinity; shows all the highways in the section covered by the map. The heavy white lines are hard surface roads; other roads not hard surface are shown in a double line; shows all roads except possibly (205) trails and some farm roads; shows lines of the Southern Raliway in wide cross-hatched lines; proposed lines of the P. and N. are shown in dotted red; shows

other railroads within the territory by single cross-hatched lines. It is a correct representation of what it undertakes to represent and is the Intervener's Exhibit 4.

I have recently had under my personal control an examination and inspection from an engineering standpoint made of the existing lines of the P. and N.; had three engineers from my office to make a walking inspection of the entire existing lines, including branch lines and industrial spurs; they made reports to me and conferred with me. I then confirmed the reports by going over the lines on the P. and N. trains and took my engineers with me over the territory which they had covered on foot; I checked their reports. Also, I walked over about 15 miles of the lines on foot.

The line from Greenwood to Spartanburg is a very well built railroad, has wide fills and cuts, is well drained, has over an average of nineteen ties to a 33-foot rail, white oak ties generally with a few pine or cypress ties; ties are spaced about as the Southern Railway spaces its ties, a shovel width apart. The rail is eighty-pound rail indicating that most of it was laid from 1911 to 1913; rail is in good condition and shows excellent maintenance. The ballast is principally cinders with occasionally spots of stone; there is a good bed of ballast, think it was originally stone with cinders used in following the original ballasting which makes a very good (206) ballast. The turn-outs and switches are a standard type in good condition. The culverts are well maintained and in excellent condition and apparently of ample capacity to take care of the drainage.

All of the bridges are steel with concrete masonry and in good condition, their capacity is E55 or better, which in engineering refers to a loading specification designed by an Engineer named Cooper.

Bridges referred to in Mr. Thomas' letter, which is the Commission's Exhibit 102 for the Winston-Salem extension are referred to as Cooper E55 and are the same bridges as those on the present lines of the P. and N. from Greenwood to Spartanburg. These bridges are heavier than some of the bridges at present on the main line of the Southern Railway from Washington to Atlanta; some of our latest bridges are installed for heavy loading, some run up to E60, but a larger number be-

tween Washington and Atlanta are of less capacity than Cooper E55. The Southern Railway regularly carries heavy trains of interstate freight over its bridges of less capacity than Cooper E55. The P. and N.'s bridges are all in good condition and show excellent maintenance.

The trestles are wooden structures the same in design as used for wooden trestles by the Southern Railway over which it runs its light Mikado Engines that have an axle loading of approximately fifty-four thousand pounds. The Southern uses this type of engine regularly to haul heavy train loads of interstate through freight over trestles of that type.

On the P. and N. main lines, the sharpest curves outside of terminals we found to be about eight degrees; (207) approaching terminals, but not including industrial tracks, we found them to be about twelve degrees; they have some very sharp curves on industrial tracks. All of this testimony which I am now giving in reference to character of roadbeds, rails, etc., applies to the line from Greenwood to Spartanburg and also to the line from Charlotte to Gastonia. The main line curvature we would not consider sharp. Our main line between Washington and Atlanta has a maximum of about six degrees, which is slightly less than the P. and N.; between Atlanta and Birmingham, we have eight degrees, which is the same as the P. and N. outside of terminals. Our line between Salisbury, Asheville, and Morristown in our mountain territory has many twelve, fourteen, and sixteen-degree curves and at Hot Springs coming off the Deep Water bridge we have seventeen degrees. This last line carries heavy freight and passenger traffic. On our main line from Spartanburg to Asheville the curves will run up to twelve degrees in mountain territory, and the same is true of our line from Bristol to the coal fields, which is a heavy traffic freight line. Our line from Cincinnati to Chattanooga, which is the heaviest freight traffic line we have in tonnage, and which carries a large number of high class passenger trains, has eight degree curves which is the same as the P. and N.

Between Salisbury, Asheville and Morristown we run practically the same class of car as is used anywhere on the system, that is the heaviest class; we operate the mountain type of engines which are the heaviest in total weight that we have; also the heavy Mikado Engines are

(208) operated there; we run our latest type Mallett Engine from Asheville to Knoxville through the crooked territory along the French Broad River so that notwithstanding the sharp curvature it is no draw-back to the operation of our heavy passenger and freight power and traction. On the terminals of the P. and N., there are curves of ten and twelve degrees about like we have on our main lines and the conditions are similar to those of the Southern line. We tried to find the sharpest curves. The sharpest degree of curvature we found on an industrial track of the P. and N. was a thirty-three degree curve at Gastonia; we also found another one of twenty-eight degrees and thirty-three degrees. In general, within cities, the curves would not run above twenty-five degrees, except in a few isolated cases such as I have mentioned.

I have compiled information in reference to a number of curves serving industries on the Southern Railway System; we have 266 curves from twenty to twenty-nine degrees, 77 curves from thirty to thirty-nine, ten curves from forty to forty-four, 9 curves from forty-five to fifty, and 3 curves over fifty degrees. The highest is a seventy-degree curve at Cincinnati. We handle engines and cars and haul freight over these I have mentioned. On the seventy-degree curve at Cincinnati we place any cars to be delivered in that section regularly. The same is true of the other curves which I have mentioned, which range from twenty to seventy degrees. I also know that all railroads have very sharp curvature tracks into industry.

In reference to lines of the P. and N. being on city streets, at Charlotte the main track comes into Mint (209) Street for a comparatively short distance, couples in with the street railway track opposite the Freight Depot, then swings back again into the passenger station; that is the only portion of the main track in a Charlotte street. They have industrial tracks in the streets and have industries connected to the street railways which they serve by operating over the street railway tracks. Going from Charlotte to Gastonia the main line of the P. and N. runs into Franklin Street, which is the main street, and runs Southwardly probably three blocks branching off to the right where they have a yard and freight depot; the passenger cars continue down Frank-

lin Street to the street that runs at right-angles between the Southern Freight Depot and Passenger Depot and turn into that street and stop about the end of the street where it goes to our track. That is the way the passenger cars are operated. Switching is done over this track on Franklin Street away beyond the point where their main passenger track swings off to the West.

The P. and N. operates no main line in streets in Spartanburg. The line which runs down the street at Gastonia to the Mills West of Gastonia is an industrial track. All railroads have industrial tracks in city streets, it is a common thing. The line of the P. and N. runs a long distance down Franklin Street in Gastonia to the mills.

At Spartanburg the P. and N. line apparently is operated over privately owned right-of-way but not on any city streets so far as the main line is concerned. The same is true at Greenville. At the latter place, the line of the P. and N. is West of the Southern Railway about a (210) half mile from the Southern's track and then swings to the East, crosses under the Southern track and gets into their passenger and freight station but not in any streets. They have switch industrial tracks through the city streets at Greenville. The P. and N. crosses our line at Belton going toward Anderson and apparently is in a street in the Town of Belton.

That is a branch line from Belton to Anderson. The P. and N. does not have a main line in any street in Greenwood, but goes through a privately owned right-of-way and couples with the S. A. L. practically at their passenger depot. In practically every city and town in which the P. and N. goes, if there happens to be a car line or if an industry happens to be on a street, they will reach it by going through the streets. In frequent instances the Southern Railway has its main line tracks in city streets; such is the case in Aiken and Allendale, S. C., Augusta, Ga., Columbia, S. C., Lynchburg, Va., Winston-Salem, N. C., Selma and Mobile, Ala., Newport, Tenn., Tuscumbia, Ala., Greenwood, S. C., Sumter, S. C., Shelby, N. C., Blackville, S. C., East St. Louis, Mo., Mt. Vernon, Ill., Princeton, Ind., New Albany, Ind., Evansville, Cannellton, Pell City and Troy, Ind., Shelbyville and Harrowsburg, Ky., Unnadilla and Valdosta, Ga., Palatka, Fla. It is not unusual for heavy freight

carrying interstate steam railroads to have main line tracks in city streets. Off hand, I personally know of a few instances of the Louisville and Nashville in Mobile, the Coast Line and Seaboard in Petersburg, the Philadelphia & Reading in Phoenixville, Pa. Hardly a railroad in any densely settled section of any state in the (211) Eastern section of the country that does not have some part of its main line somewhere in a city street.

The Southern Railway has industrial tracks in city streets most everywhere. In this respect, Richmond, Virginia, is notorious. Pick-up and delivery and so-called store-door delivery of freight and cars over industrial tracks in city streets is a regular part of the Southern Railway service and is a part of our job and wherever the industry happens to be and it has a track in the street, we place a car there and get a car. I do not think there is any question but that the same thing is true in general with reference to other interstate steam railroads in this and other parts of the country.

While I was inspecting lines of the P. and N., which inspection was in September and October, 1930, I saw all kinds of foreign freight cars on their line; these cars belonged to railroads located in the Southeastern, Eastern, Northern and extreme Western sections of the country. There were Pacific Fruit Express cars from the Pacific Coast.

From my inspection of the physical characteristics of the roadbed, tracks, bridges, etc., of the P. and N. in my opinion, its main track is in such good shape and so well maintained that the Southern Railway could operate its freight and passenger trains over these tracks with perfect safety, and I feel that if our line should be blocked, we will say between Charlotte and Gastonia, or between Spartanburg and Greenville and Greenwood, and we had a good way of getting on the line, I would (212) undertake to detour our trains. I would not want to use our heaviest class of power, our heaviest Pacific type or our heaviest Mikado type, but we take a 22" consolidation engine or light Mikado and corresponding passenger trains, and I would undertake to handle them over with perfect safety. That power would carry the freight trains of the Southern Railway. I would take the Piedmont Limited and put a lighter type of engine on it and run it from here to Greenwood, or one of the

heaviest freight trains with a little lighter engine. When the P. and N. was built, it stated that it was building a better railroad than the Southern was at that time; that is true; they have maintained their road very well. We have a little heavier rail on our main line, but they propose to use 100-pound rail on extension, and I believe that when it comes to renewing the existing 80-pound rail, they will use 100-pound rail and will have as high a standard railroad as you have.

We now have on the Southern Railway 884 miles of 80-pound rail, 717 miles of 75-pound rail, 112 miles of 70-pound, 79 miles of 65 to 68-pound rail, and 302 miles of 60 to 62-pound rails. We have some 80-pound rail on the line from Greenville to Austin; on our present main line to Atlanta we still have 85-pound rail, and it is not all 100-pound rail, this is on the double track main line; between Washington and Atlanta we have 109 miles of 85-pound rail all South of Charlotte. We have nothing less than 100-pound North of Charlotte. We have 80-pound rail scattered from Columbia to Augusta, Columbia to Charleston, and Columbia to Savannah. Interstate through traffic is constantly carried by the South-
(213) ern over these sections which have 80-pound rail and often less pound rail; we carry interstate traffic of all kinds, freight and passenger, over our lightest rail, which is 56-pound per yard.

The branch line of the P. and N. from Belton to Anderson is well constructed. It has good width of fills from 18 to 20 feet and the cuts from 22 to 24 feet. The ties are in very good condition, largely oak and round, averaging about 16 to 33 feet of rail; the rail is 70-pound and not 80-pound as on the main line. The lines of surface is good; the ballast is cinders; the turn-outs are of similar type to the main line, except lighter in weight to correspond with the rail; culverts up to 36 inches are corrugated pipe; we found one terra cotta pipe; over 36 inches they are concrete arches. Steel bridges are in concrete masonry in good condition. One bridge has a capacity of only Cooper E30, the other bridges are equivalent to E55. There are a few frame trestles of what I would call standard construction similar to those used by the Southern. Maximum degree of curvature is 8 degrees. That does not include the curve in the yard at Anderson or the "Y" connection at Belton. Those

curves are sharper. The maximum grade on this branch is 2½ per cent.

The Belmont spur is a short spur running from Belmont Junction to Belmont and was built on a much lower standard than the other lines. The fills are not as wide and in some cases are eroded to about 10 feet, cuts are very much narrower and in some cases the width at the bottom is about 13 feet. I think this spur is about 3½ miles. The Anderson-Belton branch is about 12½ miles. On the Belmont branch, the ties are (214) about 17 to 30 feet rail, are good and sound. Rail is 55-pound in fair condition; line of surface is fair; the ballast is cinders. There are no bridges on this line; there are two trestles which are standard; the maximum degree of curve is 10 degrees; grades are heavy running as high as 3.2 per cent.

The Belton-Anderson branch is equal in construction to branch lines of a similar length of the Southern. I am not sure that we have any branch line of quite as low a standard as the Belmont branch; in the past we have had and have operated freight traffic over such line and would do so today. The Belmont branch is of such character and condition as to be adapted to the carriage of train loads of freight and such train loads are handled over it; the same is true of the Anderson branch.

The grades of the main line from Greenwood to Spartanburg and from Gastonia to Pinoca are built on a maximum of 1 per cent compensated; between Pinoca and Charlotte they are heavier and run as high as 1.67 per cent, but that movement is what I would call a local movement carrying the stuff from the yard at Pinoca to Charlotte for local delivery and collection. Taking the main line of the Southern from Washington to Atlanta, we have some grades running as high as 1.75 per cent uncompensated. On the line from Salisburg to Asheville from the bottom of the mountain to Ridgecrest, that is Old Fort to Ridgecrest, those grades run 2½ per cent uncompensated. The grade up Saluda Mountain runs about 4½ per cent uncompensated. We have grades (215) on the Appalachian Division from Bristol to Appalachia, the heaviest one runs about 3½ per cent; between Birmingham and Atlanta, the grades run about 1.75 per cent. The character of traffic hauled over these

grades is national freight traffic of any and all character.

CROSS EXAMINATION.

In testifying as to the connections between the railroads on the Intervener's Exhibit 1, I meant to testify only that there were physical connections between these railroads; I could not say that open and through routes exist but that a physical connection, a possibility for such through routes exist. I would say that a trunk line railroad is one that has a through route over a long distance, for instance, the Southern's line from Atlanta to Washington, the Coast Line from Richmond to Florida, the Southern's line from Cincinnati to New Orleans, the Pennsylvania Line from New York to Chicago. I would not put any particular limit on the distance, but a trunk line might be several hundred miles long, I would say five hundred. The Durham and Southern, running from Durham down to Dunn, of itself would not be a trunk line. A trunk line is a trunk line whether it has any branches or not.

The heaviest locomotive that the Southern has in total weight would be the Mallett Engine and the heaviest one of these that we have is 469,000 pounds, engine alone, exclusive of tender; with the tender it is 660,000 pounds. I can not give the tonnage rating of that locomotive, as that depends on the line over which it is operated and is fixed by the grades of the line.

(216) I would not say that the character of the roadbed, weight of rail, loading of bridges and trestles are determined by the train proposed to be put over the track. When we build new lines, we anticipate the future and they are built to provide for heavier power than is actually operated. Our new lines are strong enough to take care of present trains.

The wheelbase of the heaviest locomotive to which I have referred, the locomotive proper, is 56.8 feet; it is an articulated locomotive composed of two engines operated independently of each other so that the engine can take sharp curves; when these two engines are put together they have a rigid wheel base; have four driving axles for each engine and the axle loading varies from 49,500 to 53,000 pounds. Those engines will run fast,

forty to forty-five miles an hour; the number of cars they would haul would depend on the grade; I know of no place where we haul as many as 90 cars; I would think we would handle about fifty cars where we operate these engines. There may be places on the line from Atlanta to Washington where the grades would permit trains of ninety cars. We may operate trains of ninety empty cars. I doubt if we could handle trains of ninety loaded cars anywhere on the main line. Between Washington and Atlanta I would say we may handle trains from sixty to sixty-five loaded cars. We use our heavy Mikado type freight engine for freight service. They will run forty to forty-five miles an hour. The weight of this engine is 326,000 pounds for the engine, and with the tender, 517,360 pounds. The axle loading of that locomotive is (217). 58,900 pounds to 60,700 pounds, and the engine has four driving axles and the rigid wheel base. The total length of the Mikado Engine fixed wheel base is 16.8 feet.

I could detour a 65-car freight train pulled by a Mikado engine over the P. and N. tracks; at first I would operate it slowly and feel my way over it because an increase in the weight of power is apt to mash spots in the track and we could catch these spots and after a short while could operate right along by strengthening and properly maintaining these soft spots; when we started to operate, it would require additional maintenance. There is no use in having your rail too heavy. The P. and N. appears to be excellently maintained; I don't know how much is spent in maintaining it; it is spending enough on maintenance for the traffic on the line and, therefore, it has a good railroad. I don't know how much money is being spent on maintenance. Of course, if there is a fixed expenditure for maintenance and there is extremely light traffic you might have a good railroad. Maintenance is not a function of the length of the train but of the number of tons and weight of power; you can operate two short trains and probably cost no more maintenance so far as cars are concerned than one train of the same number of cars.

The heaviest locomotive that I saw on the P. and N. was one hundred tons and had eight axles, and that would make 25,000 pounds per axle. Under all similar conditions it would cost more to maintain a railroad over

which locomotives were operated having an axle loading of 60,000 pounds than one over which is operated en-
(218) gines with an axle loading of 25,000 pounds. Over the 70-degree curve which I mentioned we use a very small switch engine, very light short wheel base. If we have a 20-degree curve between terminals, we would handle it with a road engine; if it is at a terminal, of course, we use a switch engine; that is merely a method of operating. We have no 20-degree curve on the main line, but if we had, we could operate one of our Mikado engines over it with slow speed. We have a 25-degree curve at our Spencer shop over which is operated all of our power used in that territory. Around those curves, we run about five miles an hour. Over the 266 curves I mentioned on the Southern, all over 20 to 29 degrees we use switch engines—not our heaviest switch engines. We could use a heavy switch engine on curves from 20 to 25 degrees; in actual practice, we use a light switch engine.

I recall only one place where the main line of the Southern was originally a street railway. This is at Selma, Ala. We acquired the franchise and use the track. It is not used jointly with the street railway. I have never known the Southern Railway to operate over any street railway track jointly with the street railway. The Southern has a very small mileage of 130-pound rail. Some street railways use a girder rail which runs as high as 145-pound. In Richmond we use a street railway rail which is required by the City in paved streets and is about 130-pound. I would say that I could look at a railroad and tell if it is a steam railroad. I could tell if it was an electric railroad because I could see the trolley; if it had a trolley I could look at it and tell if it was an electric street railway.

(219) I don't think I have ever seen a railroad operating in any city for the purpose of carrying people from one part of the city to another which was operated by steam.

There is a good long stretch of the P. and N.'s track along Franklin Avenue in Gastonia going into industries but that is beyond the point where the passenger trains swing West and turn toward the Southern Railway. Freight trains operate on down Franklin Avenue

only for switching. I didn't see any freight trains operated along there.

RE-DIRECT EXAMINATION.

The Mallett Engines of the Southern Railway are operated in its very heavy traffic, largely in coal territories over heavy grades; also over grades not so heavy; some are used in our Appalachian Division; also for carrying coal trains over this division through Bulls Gap.

W. S. LEE, President of the Piedmont and Northern, was called as a witness by the interveners, and testified:

That he was familiar with the stock ownership of the P. and N. Railroad in a general way. I think the Commission's Exhibit 93, giving a list of the stockholders of the P. and N. in the amount of 100 shares and over, is correct. On hearing of the application of the P. and N. for a certificate of public convenience and necessity I gave considerable testimony as to the stock ownership of the P. and N. and the relationship between the Duke Power Company, Duke Farms Company and other so-called Duke interests. I think I testified that the Duke Power Company owned about 10,000 shares of stock of the P. and N. Railway and Duke Farms Company owned 34,309 shares; I think that was stated in (220) the return to the questionnaire. I think I testified that the Duke Endowment owned a controlling interest at that time of the Duke Power Company; I think I testified that the Duke Farms Company, with its ownership of 34,309 shares, and the Duke Power Company, with its ownership of 10,000 shares, controlled the Piedmont and Northern, those two stock lists being a little over one-half of the entire capital stock. I think I said that the stock ownership of the Duke Power Company and the Duke Endowment was a little over one-half of the total shares of the P. and N. stock.

The 10,090 shares of stock owned by the Duke Power Company in 1927 are now owned by the Duke Securities, which latter Company is a company owning certain securities not used in connection with the power

business, such as a few cotton mills, office building stock, P. and N. stock, etc. The Duke Power Company owns and controls the Duke Securities Company and, therefore; controls the 10,090 shares in the P. and N. referred to. The 34,309 shares which in 1927 were owned by the Duke Farms Company are now owned by the Duke Endowment, as I understand it; I am not quite sure that is correct. The Duke Farms Company has been dissolved and its securiteis have gone into the Duke Endowment.

I testified that in 1927 the Duke Endowment owned the controlling stock of the Duke Power Company. That is still the case as I understand it. The Duke Endowment indenture specified that outside of state and municipal securities its funds should only be invested in the securities of the Duke Power Company and the various Duke Power Companies. There is no doubt that the (221) Duke Endowment through the Duke Securities Company and the Duke Power Company owns a controlling stock ownership in the P. and N.; these companies, however, do not exercise that control any more than an ordinary stockholder would.

The Duke Power Company owns the entire stock of the Southern Public Utilities Company, which latter company owns utilities properties at various points in North Carolina and South Carolina; at Winston-Salem, Burlington, Greensboro, some at High Point, Salisbury, Hendersonville, Charlotte, Bessemer City, Hickory, and Reidsville, North Carolina; Anderson, Greer, Chester, Fort Lawn, and Spartanburg, South Carolina. Since 1927, the Southern Power Company has changed its name to Duke Power Company and certain other companies have been merged into the Duke Power Comapny; these other companies which I testified about in 1927, Catawba Power Company and Wateree Electric Company, have been merged into the Duke Power Company. The steam power plant at Greenville is owned by the Duke Power Company, and also the one at Duncan, S. C., Mt. Holly, Spencer, Greensboro and Eno, N. C. Since 1927 the Duke Power Company has constructed the River Bend steam station about six miles from Mt. Holly, N. C.; this is touched by the track of the P. and N.; this is the only plant built since 1927.

Since 1927 the Duke Power Company has attempted

to sell its stock in the American Hardware & Equipment Company, but I don't know whether it has been sold or not. The First Street warehouses at Charlotte are owned by the Duke Securities Company. The Catawba Manufacturing and Electric Power Company is a land (222) company with some undeveloped water rights and this company is controlled by the Duke Power Company. The Duke Power Company owns no stock in the Judson Cotton Mill; this stock has been sold since 1927. The Mill Power Supply Company is a purchasing company for the Duke Power Company and is owned by the Duke Power Company. The Tuckaseege Spinning Mill is a little mill on the Catawba River which we bought in connection with water rights in development of Catawba River Station hydro plant; I don't know what company owns it, but it is controlled by the Duke Power Company; the same is true of the Superior Yarn Mills. The Great Falls Power Company has been merged into the Duke Power Company. The Duke Securities Company owns the stock of the Republic Cotton Mill; that is over half of the stock. The power plant formerly belonging to the Western Carolina Power Company has been merged into the Duke Power Company, but Western Carolina Power Company still owns undeveloped water rights and this is controlled by stock ownership of the same interests. The same is true of the Wateree Power Company. The Mercantile Development Company is owned by Duke Securities. Carolina Standard Gas Products Company has been sold to another company.

I think the P. and N. Railway owns the same warehouses at Charlotte as it did in 1927, and in some cases these warehouses are rented to tenants who are shippers and receivers of freight; the same is true at Gastonia and Spartanburg and Greenville and Anderson. We rent them to shippers and receivers of freight when we can.

Number 535 Fifth Avenue, New York, is an office building; I have an office there and several other offices (223) of the Company; the Duke Power Company has an office there, also the P. and N. Railway and the Duke Endowment. I don't know anything about the Linden Investment Corporation; it is not one of the Duke companies that I know of, it may be some member of the Duke Organization. I am not sure about the Rough Point Investment Corporation. I think it is a company

that perhaps Mr. Duke had, a personal company—Mr. J. B. Duke—but I am not sure about it; it is not one of the Duke group. I don't know anything about the Pierson Investment Corporation. The Marlee Investment Company has nothing to do with the Duke Interests; it is a company of mine.

Angie B. Duke was a son of B. N. Duke, who was an older brother of James B. Duke. Doris Duke is the daughter of James B. Duke and is the Doris Duke mentioned in the Duke Endowment as having a trust erected for her. The Trustees of the Doris and Nanaline H. Duke Trusts are G. G. Allen, W. R. Perkins, W. S. Lee, W. C. Parker, A. H. Sands, W. B. Bell, Nanaline H. Duke, E. C. Marshall, C. I. Burkholder, N. A. Cocke, R. L. Flowers, Benjamin Cox and B. L. Geer. The same men are Trustees of the Duke Endowment, the personnel is the same and the headquarters of that Trust are 535 Fifth Avenue, New York.

W. C. Parker, whom I mentioned, is the one mentioned in certain correspondence with Mr. Thomason, introduced in evidence; A. H. Sands is the A. H. Sands mentioned in some of that correspondence and W. S. Lee is the W. S. Lee mentioned in that correspondence. The P. and N. does not now and never did own any stock in any textile or other manufacturing concern.

(224) The Duke Endowment owns no stock in the Judson Cotton Mills and never did. All of the stock owned by the Duke Endowment in the R. J. Reynolds Tobacco Company of Winston-Salem has been sold for the purpose of building Duke University, that is, no money was turned over to the Duke Endowment and the Endowment had to turn a large block of money into buildings and it sold securities, including the Reynolds tobacco stock, to get money for that fund; that has been a couple of years or more ago. Under the Duke Endowment and under the Duke Will, the Duke University is now being built.

The paper shown me is an official Railway Guide, and on pages 674-675 is a map of the Piedmont and Northern Railway and the Durham and Southern, and on the opposite page is a time table. I assume that the information contained in the Railway Guide was furnished by the P. and N. Railroad. I assume information is furnished from time to time in order to keep the

Guide up to date. The map file bears the legend "Piedmont and Northern Railway, Durham and Southern, and connections"; under that it has black with white dots "In Operation", and white with black dots "Projected Extensions". In the lower right hand corner it has the two concentric circles with Piedmont and Northern and the flash of electricity, which is the P. and N. symbol. The list on the next page shows the principal officers of the P. and N. Railway. It shows W. S. Lee, President, G. G. Allen, Vice President, 535 Fifth Avenue, New York, N. A. Cocke, Vice-President and Treasurer, E. Thomason, Vice-President and General Manager, F. E. Lagerholm, Assistant to the General Manager, J. C. Mc-(225) Gowan, Secretary, J. S. Cureton, Traffic Manager; he is located in Greenville; C. T. Brown, Assistant Traffic Manager, Cincinnati. I am not acquainted with him. W. I. Rankin, General Freight and Passenger Agent, Greenville, L. R. Lawson, Assistant General Freight Agent, Charlotte; E. B. Hardin, Auditor; T. L. Black, Freight Claim Agent; W. R. McLawhorn, Transportation Superintendent; W. L. Hogan, Transportation Superintendent, Charlotte; W. F. West, Division Freight Agent; L. F. Crenshaw, Commercial Agent; E. K. Johnson, Commercial Agent; C. D. Turner, Commercial Agent; Jackson is at Gastonia and Turner at Anderson; S. M. Howard, Commercial Agent, Greenville; H. W. Tuthill, Division Passenger Agent; I know the P. and N. has a Commercial Agent at Cincinnati. R. L. Hand, Commercial Agent, Spartanburg; H. R. Roby, General Eastern Agent, New York City; the P. and N. has an Agent at Atlanta, Ga.; a commercial agent, that is, a traffic man; J. V. Sutton, Chief Claim Agent, Charlotte; R. N. Ward, Claim Agent, Greenville; A. D. Fry, Superintendent of Motive Power. The Guide then says "General Offices—Charlotte, N. C."; I don't think that applies to both the P. and N. and the Durham and Southern. I am not President of the Durham and Southern and don't know anything about it. I think the Durham and Southern and the Piedmont and Northern have the same general offices in Charlotte, but I don't know who are the officers of the Durham and Southern and never had anything to do with them in my life.

According to the list shown on the Railway Guide, Mr. Thomason is President and General Manager of the

Durham and Southern; I know that, and I know that Mr. Parker, 535 Fifth Avenue, New York, is Secretary and (226) Treasurer of the Durham and Southern. The Durham and Southern has an office at 535 Fifth Avenue. Mr. F. E. Lagerholm may be Assistant to the President of the Durham and Southern, but I don't know about that. It may be that it is so shown on the page of the Guide, in fact, the Guide so states.

You ask if the Durham and Southern is controlled by the same interests as the Duke Power Company and the Duke Endowment; I ought to know about this, but I don't. I think the Duke Endowmwnt does it, I am not sure about it; it is not Mr. Duke's estate—I am rather doubtful about it. I never had anything to do with the Durham and Southern; I don't know that Mr. James B. Duke built it; I remember at one time Mr. B. N. Duke was its President.

I don't know what the Newton Investment Corporation is, don't know anything about it, nor that it has an office at 535 Fifth Avenue, New York.

The Duke Power Company in itself, and through the other companies about which I have testified as merged into it, is a very large shipper and receiver of freight moving into and out of and through the Piedmont Section of North and South Carolina. The shipments of coal to the steam power plant alone are very considerable, varying, of course, with the amount of the coal used. We ship an enormous amount of coal when those plants are in action, and we ship enormous amounts over the Southern Railway.

The testimony which I gave before the Interstate Commerce Commission in 1927, which has been introduced in evidence in this case, is true and correct as of that date and any difference would simply be things that have happened since that time.

CROSS EXAMINATION.

(227) I was mistaken regarding the 34,000 shares of stock which were owned by the Duke Farms Company at the time of the hearing before the Examiners. After Mr. Duke's death, those 34,000-odd shares were divided as follows: To the Duke Endowment, 19,031 shares; to

the Trustees for Nanaline H. and Doris Duke, 9,515 shares, and to Nanaline H. Duke, First Successor Trustee for Doris Duke, 3,301 shares. I was mistaken in regard to these shares going to the Duke Endowment. The only control that the Duke Endowment has over the Piedmont and Northern is its ownership of 19,031 shares of stock in its name, and such control as the Duke Endoment has over the 10,090 shares owned by the Duke Securities Company, as shown on Exhibit 93. The list of stockholders as shown on Exhibit 93 is correct so far as I know.

Neither the Duke Endowment nor the Duke Power Company, nor any other interests which have been referred to in this case as the Duke Interests, exercise any control over the Piedmont and Northern, except such control as it may exercise as a stockholder. None of these companies exercise any direct or immediate control over the Piedmont and Northern. The Superior Yarn Mill is not located on either the present or proposed lines of the P. and N.; it is served by a line of the Southern Railway exclusively. The Republic Cotton Mills is not located on either the present or proposed lines of the P. and N., and it is served exclusively by the Seaboard Air Line. There has been a small addition to the Republic Mills built since I testified before the Commission in 1927; the principal addition was made prior to that time.

(228) LINCOLN GREEN testified for the Interveners:

I am Assistant to the President of the Southern Railway; have had official responsibilities in the traffic organization of that road for more than thirty years; was Freight Traffic Manager from 1905 to 1917, Vice President in Charge of Traffic from 1917 to 1922; since 1922, on account of trouble with eyes, have been Assistant to the President, serving in advisory capacity. My duties have made it necessary to keep in intimate contact with traffic questions, rate adjustments, and what is going on in the traffic field. I think that from 1905 to 1917 I was as intimate as any one could be with actual traffic and movements of traffic on the Southern Railway and other railroad lines in the Southeast, particularly in and through the Piedmont Section of North and

South Carolina. I was directly responsible for rate adjustments, solicitation effort and for industrial development. I had actual knowledge of the movement of traffic and routes. From 1917 to 1922 I continued to have an intimate knowledge of such matters; I was in charge of all traffic, freight and passenger. Since 1922 I still have direct supervision over industrial and agricultural organization, analysing statistical information, special studies about rate problems, a pretty intimate contact of what is going on. Daily reports are read to me relating to the business of the Company, movement of traffic, car loadings, earnings and a multitude of things. I keep up with all of these things. At times I attend rate conferences, particularly of the Executive Commission of the Southern Freight Association; I am on the committee of traffic executives of the American Railway (229) Association, which handles interterritorial and national questions where all the railroads have a common interest. I represent the Southern Railroad and all of the Southern Roads on that Committee, as one of three representatives from the South.

I was familiar with the facts and circumstances as to the completion of the present line of the Piedmont and Northern, and of the inauguration of its railroad business; in other words, everything that occurred prior to 1923. The railroad situation in 1910 was substantially what it is now, except, of course, as to the P. and N., which had not been built. The Clinchfield had come into Spartanburg. The most important change in the past twenty years probably has been the improvement of the Southern and its double track. At that time it was a single track railroad. As to the traffic situation, there had grown up along the line of the Southern at Greenwood, Greenville and Spartanburg, a chain of cotton mills; there were more mills and more spindles and looms then in that small territory than in any other like area in the South; there was the largest consumption of cotton and the largest manufacture of cotton goods. There was an important and very substantial development in and about Gastonia; these were spots which were particularly attractive from the standpoint of the traffic man. There was a large movement of inbound cotton from all over the cotton-producing area, the cotton coming from the Carolinas, Georgia, Alabama, Mis-

sissippi, New Orleans and Memphis. There was a substantial movement of coal; all that interest had grown up through the use of coal and it came from the East Tennessee territory. Later it developed in Southwest (230) Virginia and the Clinchfield entered a new area. Also there was a valuable inbound traffic of new machinery, manufacturing supplies, food supplies from the West and merchandise from the East. The outbound traffic was mainly cotton manufacture, much of which at the time moved to the Eastern Seaboard. There was not yet much development of bleacheries and finishing plants and lots of stuff went to New England to be finished and distributed from there; there was a very wide distribution direct from the mill doors all over the country and we had been called on to establish rates from these mills for direct shipment to virtually every town and hamlet in the United States. That was about the traffic situation in 1910 and 1911 when the Piedmont and Northern came into the foreground.

At that time the Seaboard served Greenwood, Anderson, Calhoun Falls and Chester; it could not get into the territory farther West between Greenwood and Greenville and on the Southern main line and into Gastonia, except that it had a route from Gastonia by Chester in connection with the Charleston and Western Carolina Railroad. It did share that traffic to whatever extent it could by ordinary solicitation; the route was open and it had a right to go in there; it never got enough to satisfy it. It could participate very little in the territory served by the Charleston and Western Carolina, because the latter road and the Southern, as initial lines had their own routes virtually everywhere except, of course, on territory particularly local to the Seaboard. Therefore, the Seaboard did not participate in this large and attractive business in this particular field to any substantial extent.

(231) The Commission's Exhibit 17 is the contract between the Piedmont and Northern, or its predecessor, and the Seaboard Air Line Railway, dated December 9, 1910. The original charter of the P. and N. Exhibit 15, was dated February 24, 1911. The Gastonia and Charlotte line of the P. and N. was completed in July, 1912; from Greenwood to Greenville in November, 1913; from Greenville to Spartanburg in April, 1914.

The contract between the Seaboard went into effect upon the completion of the present lines of the P. and N.; they still operate under it. I know of no amendments to it except as to change in percentages. The Seaboard extends from Portsmouth, Virginia, and from Richmond to this Southeastern territory; to points in Florida on both the East and West Coast. It has a line from Atlanta to Birmingham and from Savannah to Montgomery. The instant the operation of the P. and N. lines began, the channels of traffic in this territory changed to the extent of the diversion by the P. and N. outbound or the Seaboard inbound over these new routes.

The Seaboard had connections at Portsmouth with all the coastwise steamship lines operating daily to Baltimore, New York, Boston and to export and import traffic which might pass through Norfolk. It had connection, all rail, with the Pennsylvania beyond Norfolk, and through what is now the Richmond and Washington line to Washington with the B. and O. and Pennsylvania; it connected at Portsmouth with the Norfolk and Western and at Richmond with the C. and O. As to this entire Eastern territory and Northern territory, the (232) P. and N. gained access under that contract on all its outbound traffic and could participate in all the inbound traffic that the Seaboard and the P. and N. might attract into the territory they served. The Seaboard had connections at Birmingham and Montgomery with lines leading out through Memphis and New Orleans, connecting with the entire Western and Northwestern transportation system. It had rates and divisions in connection with all of those lines and the P. and N. was thus able to gain access to the entire North and Northwestern traffic all the way to the Pacific Coast.

The North Carolina line of the P. and N. had direct connection at Charlotte with the Southern and participated in rates and divisions from all points on its line between Charlotte and Gastonia through Winston-Salem in connection with the Norfolk and Western to the entire Eastern Seaboard through its Potomac River gateways where it connects with the Pennsylvaniia, B. and O. and Western Maryland. It had access to the whole Northern and Eastern territory; also the Southern Railway route from Charlotte to Washington and the East. Through the Norfolk and Western it had access to the

Northern and Western territory through Kenoba and Cincinnati, where it connects with all railways in that region and on out through the Northwest to the Pacific Coast. Through the Seaboard it connected with the C. C. and O. at Bostic and obtained access to the territory served by the C. C. and O., which connects to the Norfolk and Western at St. Paul, Virginia, and then with the C. and O. at Elkhorn City, so it could participate in traffic moving over that route to the North and Northwest, as well as in the coal traffic originated by the C. C. and O. I don't think the Norfolk and Southern had (233) been completed into Charlotte at that time, but when it came, the P. and N. obtained routes in connection with it to all the territory it serves through it, and its connections, and finally through the Winston-Salem Southbound it could reach Winston-Salem and a connection with the Norfolk and Western.

As to the South Carolina line of the P. and N., it obtained in connection with the S. A. L. all that I have stated that was obtained by its Northern line through its contract with the Seaboard. I mean, as to opportunity to reach the entire country. In addition, on its completion to Spartanburg, it had another connection with the C. C. and O., not only to points on that road, but to points beyond reached by the Norfolk and Western and C. and O., and it became an important link between the C. C. and O. and the S .A. L. as to coal and other traffic. It formed a connection at Greenville and Spartanburg with the Southern and could handle traffic interchanged with the Southern over practically every part of the country served by the Southern, except to its local territory where it was destined to common points, but our line was open all the way to the Ohio River, St. Louis, Memphis, and other points in the South, and through our connections in the North and East to substantially the whole country. This contract between the S. A. L. and the P. and N. had the effect of changing the routing of business on cotton goods outbound, cotton machinery, and other things inbound into this territory.

The effect of this contract was a diversion of traffic in substantial volume, which increased from year to year (234) from the Southern, the C. and W. C. and other railroads in this territory; it has continued in increasing

volume as shown by the statistics of the P. and N. in this case.

The Commission's Exhibit 71 shows that in 1929 the P. and N. received from the S. A. L. 36,572 cars out of a total of 49,263; it delivered to the S. A. L. 19,476 out of a total of 23,987; it received and delivered from and to the S. A. L. 56,048 cars out of a total of 73,250. Prior to the contract between the S. A. L. and the P. and N. the Seaboard did not carry any such volume as is indicated by these figures. These figures represent the total interchange between the S. A. L. and the P. and N. at Pinoca and at Greenwood to and from all points virtually in the country.

Throughout its operation the P. and N. has exhibited a very strong influence in these communities in the routing of both inbound and outbound traffic.

From a traffic standpoint, the Piedmont and Northern, as a competitor of other carriers of this territory for freight traffic, has had the effect of making solicitation of traffic in this territory in competition with the P. and N. very ineffective, and with respect to many of these industries, substantially destroys altogether our influence where the competition of the P. and N. is involved.

The steam power plants of the Duke Power Company, referred to by Mr. Lee in his testimony, consume coal. As to the South Carolina territory, this coal comes chiefly, if not altogether, from Southwest Virginia and (235) Southwest Kentucky. I think the plant at Mt. Holly gets coal from both fields. The plant at Salisbury, which is served only by the Southern, gets its coal, as a rule, from West Virginia; they have brought coal in there in substantial amounts from the West Virginia field and also from the South West Virginia field. That has to move by the Southern Railway. There is no other way for it to go.

The plant at Mt. Holly is near Mt. Holly on the River; coal from it bought in South West Virginia, as a rule, would move over the C. C. and O. to Bostic, then by the S. A. L. to Pinoca and delivery would be made by the P. and N. Coal from the West Virginia field, which has moved, some of it at least that I know of, by the Norfolk and Western to Durham and then by the Durham and Southern to Apex, then by the Seaboard

Air Line to Pinoca and the P. and N. to the plant. There are more direct routes. From these West Virginia fields to Mt. Holly, a short route would be through Winston-Salem in connection with the Southern Railway to Charlotte; through Winston-Salem in connection with the Southbound and the Norfolk and Southern would be available. From the Norfolk and Western mines, the route through Lynchburg in connection with the Southern is shorter and from the C. and O. mines would be shorter, and from the Virginian Railway mines through Alta Vista is shorter.

Overhead or bridge traffic is traffic that passes from one carrier over an intermediate carrier to a connection beyond. To illustrate, the P. and N. is an overhead carrier on traffic which the Clinchfield brings to Spartanburg for delivery to the Seaboard at Greenwood or the Georgia (236) and Florida at Greenwood. That would include coal traffic that may come over the Clinchfield or from the C. and O. or Norfolk and Western in territory near St. Paul, Virginia; it would include all miscellaneous through traffic that flows through the Ohio River crossings in connection with the C. and O. from the Pittsburgh and Buffalo territory and West of it, including such points as Cleveland, Detroit, Chicago, Columbus and the rich manufacturing district of the Central Northern territory. It would include grain and grain products, packing house products and machinery, all sort of manufactured materials. And in the reverse *direc* direction, it includes all kinds of traffic that originates in the Southeastern territory, fruits, vegetables, lumber, forest products and cotton goods at which might originate beyond on the terminus of the P. and N. at Augusta and down through that way in connection with the Georgia and Florida. It would include traffic from points on the Central of Georgia, which connects with the Georgia and Florida at Augusta. This covers the potentialities of such overhead traffic and I think probably, in a substantial way, covers the actual movement.

At present here is no such overhead business immediately available to the North Carolina division of the P. and N. If the P. and N. should build its line from Spartanburg to Gastonia, the first and immediate effect would be with respect to the territory between those two points and all of the advantages now possessed by

the P. and N. with respect to traffic on its existing lines would be extended to embrace that new field. It would have a continuous through line between Greenwood and (237) Charlotte, forming connection at Charlotte as to all of its territory with other carriers extending North and East from Charlotte and would have access by that route to everything it now has access to, or almost everything in connection with the route through Greenwood, and as to the Northern line, access through Greenwood to all the territory that its Southern line now reaches through Greenwood. It would give the P. and N. through the northern part of its line in connection with the Southern, access to Winston-Salem; connection with the Norfolk and Southern and Winston-Salem Southbound to Winston-Salem, and there a connection with the Norfolk and Western to all territory I have heretofore described as accessible to that line. It would make it possible to handle a great part of traffic that now gets down here for a longer haul through Charlotte that might move out to the North or Northwest in connection with the Clinchfield or that might to some extent move by Greenwood in connection with the S. A. L. The construction of this link would open up new routes for overhead traffic as to any traffic they might be able to influence in connection with the Georgia and Florida, say through Greenwood going beyond Charlotte in connection with the Norfolk and Southern directly or in connection with the Winston-Salem Southbound, or even in connection with the Southern. It would then become a more or less formidable through route to and from territories served by the Georgia and Florida and its connection in the Southeast.

If, in addition to this connection, the P. and N. should build from Charlotte to Winston-Salem, making a complete line from Greenwood to Winston-Salem, that would have the effect of forming a through route or system (238) extending all the way from Florida to a connection with the Norfolk & Western and through its connections to the entire Eastern Seaboard and Northern and Northwestern territory. It would make possible by that route for traffic to flow all the way from Maine to California, perishable traffic, all the manufactures that come from the North and Northwest territory and in the reverse direction, the fruits and vegetables of the South,

the lumber and cotton goods and other things that originate in that territory.

The supplemental return of the P. and N. to the questionnaire of the Interstate Commerce Commission, which is the Commission's Exhibit 6, and the answer and table on page 17 states that applicant's new mileage is not being constructed primarily for the purpose of constituting a connecting link between existing railroads, but the line when completed, in addition to performing an interurban service, will be used as a connecting link between existing railroads, and the kind and volume of traffic which will probably interchange will be as follows: Items and estimates of carloads of overhead traffic to be gained, 600 carloads of grain and grain products; that is for the year, the first year. The principal movement of grain and grain products into and through the Carolinas comes from Pennsylvania, Maryland and Northern Virginia. Some from West Virginia, and to a large extent, from Ohio and not infrequently from Chicago or even St. Louis and Kansas City; generally speaking, that is where the business comes from. The next item is packing house products, 300 cars. That would come chiefly from Chicago, Indianapolis, Cincinnati, St. Louis, Kansas City and Omaha. Perhaps some of it (239) from Buffalo, but the main part from those large packing house points. The next item is fruit and vegetables, 300 cars; I think, perhaps, he underestimated there. This would include apples from Virginia, Maryland, New York; vegetables from the same origins, from the Niagara frontier, including Canada. It would include Pacific Coast products, apples, etc.; apples and vegetables from Michigan and Ohio. In the reverse direction, they would handle fruits and vegetables from Florida and the South Atlantic Seaboard, *mellons*, etc.

The next item in the return to the questionnaire is coal and coke, 2,100 cars. The P. and N. would become an overhead carrier with respect to coal and coke that did not originate on the Norfolk & Western and move, say, to Augusta in connection with the Georgia and Florida; might move to points on the S. A. L. through Pinoca, or Greenwood in the event that it moved to the South Carolina territory. The next item is building materials, 2,700 carloads. That includes many things and would probably come from both directions; lumber

from Georgia and Florida, destined to and beyond points in Virginia. It would include stone and brick and other building materials from in or beyond Virginia to points South of Greenwood, or it might interchange with the Seaboard at Pinoca the same kind of traffic moving to and from Virginia or points beyond.

The item of merchandise is 1,800 cars; this covers all miscellaneous less than carload traffic flowing into and out through the territory. It would probably consist mainly of manufactures from the North and East. The item of automobiles, 900 cars; that comes from Detroit, Cleveland, Chicago, South Bend and that region. (240) The total estimate of cars of overhead freight in the return to the questionnaire is 12,300 for a year. By my knowledge of the traffic into and out of the territory that would become accessible to this route in connection with the Georgia and Florida and the Norfolk and Western, the potentiality of the route as to overhead traffic would be, in my judgment, much greater than 12,300 cars a year.

In the United States there are three divisions of territory in a rate sense, territory South of the Potomac River and East of the Mississippi, and to Chicago and the rest of the country, which is subdivided; broadly speaking, these are the three rate territories. Rarely is there a case that you can change a rate without affecting the rates within the region, or an interterritorial situation may be involved. For instance, here is a great cotton manufacturing district that distributes its products all over the country. These rates were made to the Northern and Western territory with relation to the rates existing from the other large manufacturing districts in New England. At first we made the rates to Chicago from here the same as from New England; if we undertook today to change the rate from here to Chicago, it would probably bring about the changes in rates from New England to Chicago. Within our own territory rates are governed largely by mileage and they are so related that you can scarcely change one without changing many.

Referring to the P. and N., the traffic which it originates and delivers, it, of course, has the power to change its own rates, but there is scarcely a rate that it changes that it would not affect the rates of its neighbors. It

(241) can, through the concurrence of the Seaboard, say, change the rates between this region and Norfolk, Richmond, Jacksonville or Birmingham, but it would not do that without changing the rates of all other railroads on the same thing through the same territory, and probably through the whole Eastern Seaboard through the S. A. L. and its connections. If it made a change in the rate of cotton goods, it would make a change in the rate of all cotton goods and the whole Eastern Seaboard probably. If it undertook in connection with the Clinchfield and C. and O. to change a rate out of Chicago, or through concurrence on the inbound rate into this territory, it would affect the rates of all routes on the same thing between the same points and also would probably affect a rather large area of additional territory reached by other routes. If it made a connection with the Norfolk and Western at Winston-Salem, it would have that additional opportunity for affecting rates. The representatives of the P. and N. engage in holding conferences of committees in the South that discuss all these changes in rates and have voice in those discussions equal to that of any other line, and it does have a very substantial potential influence upon the nationwide rate adjustment.

CROSS EXAMINATION.

The contract between the S. A. L. and the P. and N. is a preferential contract; it is not typical; I do not at the moment recall anything of the same kind; if they have existed in the past they have been virtually eliminated because of the universal privilege of the shipper to route his business in any way he chooses if it is an open route.

(242) The Ware Shoals Railroad was built by and is owned by the Southern Railway, and was leased for operation to the Ware Shoals Manufacturing Company, which latter Company organized the Ware Shoals Railroad Company, which took over the operation of that little road. The Carolina and Northwestern is a Southern Railway property, and while there is no contract that it should give all of its business to the Southern—as a matter of fact it does not; it has always had more or less interchange with the Seaboard at Chester, very probably much less now than formerly. In 1910 the Caro-

lina and Northwestern was not a Southern Railway property, except that the Southern was responsible for it and had endorsed its bonds; it was so closely affiliated that it was virtually a Southern Railway associated line. In 1910 it was open to all commerce so far as solicitation and routing was concerned. I don't think that prior to 1910 the Carolina and Northwestern refused to do business with the Seaboard; I think it was practically the contrary. Don't think we had a contract with the Carolina and Northwestern in 1910. We may have had a traffic agreement with them, I do not recall.

I don't know of any contract between the P. and N. and the Carolina, Clinchfield and Ohio, or any traffic agreement between them. I don't think there is *an* preferential arrangement between the P. and N. and the Charleston and Western Carolina. I don't know that the P. and N. has any contract at all with the Georgia and Florida. I don't know of any affiliation in any way between the P. and N. and the Norfolk and Western. The Norfolk and Western and the Southern are very close (243) and friendly. We have an important interchange with them through Winston-Salem and also Bristol and Lynchburg. The Clinchfield is now leased jointly to the Atlantic Coast Line and the Louisville and Nashville, and the Atlantic Coast Line controls the Charleston and Western Carolina. I know that there is now pending before the Interstate Commerce Commission an application for a physical connection between the C. and W. C. and the Clinchfield at Spartanburg.

I do not have the information in my possession now as to the number of cars of bridge traffic moving between the Clinchfield at Spartanburg and the Seaboard at Greenwood. I cannot state either in tons or revenue the proportion of bridge traffic handled by the Southern Railway; speaking from memory, I would say it is not more than 15 per cent of our whole traffic; of course, it varies from time to time. I cannot say that, stated in tonnage, it is between 40 and 45 per cent. I was thinking more in terms of revenue than in tons; of course, in handling coal bridge traffic it runs into tons pretty fast and not so much into revenue.

If the P. and N. should build its line from Spartanburg to Gastonia, this would give its lines in South Carolina a new connection at Charlotte with all the

lines radiating from Charlotte; for instance, it would have a connection at Charlotte, say, with the Norfolk-Southern which it does not now have except as to its North Carolina line.

The Duke Power Company has a steam plant at Eno, near Durham; this is served exclusively by the Southern Railway; the same is true of a steam plant which it owns (244) at Greensboro and the one I referred to at Salisbury. I do not know how much revenue the Southern received from the traffic handled to the Buck plant at Salisbury in 1929; my recollection is that the figures for 1926 were about $750,000; the movement varies a great deal, dependent upon the flow of water and the demand for electric power. The double-tracking of the Southern between Charlotte and Greenville was completed during the period of Federal control; it was contracted for before that time, that is, before January 1, 1918; I don't know whether it was after 1914 or not. When the P. and N. first constructed its existing lines the Southern through this section was a single track line of railroad.

GEORGE H. KERR testified for the Interveners:

I am freight traffic manager of the Southern Railway; have been engaged in railroad traffic work for 30 years; for the first seven years with the Pennsylvania Railroad and since that time with the Southern; have been travelling freight agent, commercial agent at Pittsburgh and then at Atlanta. In 1917 was made Assistant General Freight Agent in charge of rates; in 1922, Assistant Freight Traffic Manager at Atlanta, and in 1924, Freight Traffic Manager, which position I now hold. I have been familiar with traffic conditions in the Piedmont Section of North and South Carolina since 1907, and since 1914 until the present time I have been in even much closer touch with the situation here. In preparing to testify before the Interstate Commerce Commission in 1927, I made a special study as to traffic in this terri- (245) tory and as to the P. and N. Railway; spent a full month in this territory at that time.

Today there are three through trunk lines from Florida and the Southeast to the East and North; the Southern, the Atlantic Coast Line and the Seaboard. These are the only through trunk lines, or through routes

today between those territories. If the P. and N. should build between Spartanburg and Gastonia and/or from Charlotte to Winston-Salem, there will be estabished a fourth through trunk line; namely, the Georgia and Florida from Madison, Florida, to Greenwood, the Piedmont and Northern to Charlotte or Winston-Salem, and from Charlotte you would have a through route over the Norfolk-Southern to Norwood, and the Winston-Salem Southbound to Winston-Salem, and the Norfolk and Western and its connection to the entire East and North. If the line were extended from Charlotte to Winston-Salem it would afford a more direct and logical through route, but independent of the Winston-Salem line there would be created a new and complete through trunk line from Florida and the Southeast to the East, wholly independent of the three existing through trunk lines.

I have made a special study of the actual traffic which would be available for such a new through trunk line. It covers our actual handling of freight traffic between territories south of the P. and N., which roughly covers South Carolina south of Greenwood, Georgia on the South of the Southern Railway from Alabama to Atlanta, and on the south of the Georgia Railroad from Atlanta to Augusta. I excluded the territory in Northern Georgia. That is the territory in the Southeast from and to which the P. and N., if it becomes a through
(246) trunk line, or through route, will be properly tributary; traffic can logically move to and from that territory through Greenwood, the P. and N. to Charlotte, the Norfolk-Southern and Winston-Salem Southbound either to Winston-Salem or Norfolk, and if the line is extended to Winston-Salem it would connect with the Norfolk and Western there and its connection to the North and West. I have taken the actual movement of our traffic for the first six months of this year, separated by states and commodities actually moving between the two territories I have defined; this is not guess work or estimate, but a statement of the actual traffic. This statement includes North bound and South bound traffic between the two defined territories, and is traffic which in my opinion, would be available to the P. and N. if hooked up as I have described; that is, the P. and N. would have an opportunity to secure it; it is from and

to origins and destinations where the P. and N. route would, in my opinion, be the reasonably logical route. I have separated the North bound from the South bound traffic, making a separate statement, and then have shown the total on one statement; it is our actual movement for the first six months of 1930. Our records show that our business for the first and second six months of each year matches up very well; there is very little difference, and I had in mind to double the business we actually handled for the first half of 1930 to determine what would be available for the entire year. This statement shows the South bound traffic from the territory beyond Winston-Salem and Norfolk and the Virginia gateways to Georgia, Florida and South Carolina, as I have heretofore described.

(247) The statement shows: Agricultural implements to Georgia, 6 cars, Florida, 2; total 8 cars. Tankage to Georgia, 32 cars, Florida 6, South Carolina, 2; total 40. Automobiles and parts to Georgia, 2,277, Florida 432, South Carolina, 106; total, 2,815. The statement includes a little traffic brought down west of the mountains to Atlanta and then distributed. Statement includes brick, tile and clay to Georgia, 38 cars; Florida 21, South Carolina, 14; total, 73. Coal, to Georgia, 16 cars, Florida, 2, South Carolina, 274; total, 292. Glass, fruit jars and bottles, to Georgia, 97, Florida, 3, South Carolina, 6; total 106. Fruits and vegetables, to Georgia, 4 cars, Florida, 1, South Carolina, 1; total, 6. Furniture, to Georgia, 56 cars; Florida, 27 cars, South Carolina, 52 cars; total, 135 cars. Grain, wheat, etc., to Georgia, 332 cars, Florida 101, South Carolina, 346; total 779 cars. Hay and straw, to Georgia, 1,035 cars, Florida, 452 cars, South Carolina, 1,050; total, 2,737 cars. Iron and steel, to Georgia, 399 cars, Florida, 30, South Carolina 138; total, 567 cars. Machinery, boilers, etc., to Georgia, 365 cars, Florida, 33 cars, South Carolina, 210 cars; total, 608 cars. Merchandise, to Georgia, 1,240 cars, Florida, 2, South Carolina, 685; total, 1,927 cars. Packing house products, to Georgia, 228 cars, to Florida, 134, South Carolina, 43; total, 405 cars. Paper, roofing and roofing paper, to Georgia, 311, Florida, 41 cars, South Carolina, 65 cars; total, 417.

Plaster, lime and cement, to Georgia, 38 cars, Florida, 15, South Carolina, 68; total, 121 cars. Salt,

to Georgia, 29 cars, Florida, 1, South Carolina, 14; total, 44 cars. Soap, to Georgia, 54 cars, Florida, 21, South (248) Carolina, 8; total, 83. Oil petroleum, to Georgia, 42 cars, Florida, 69, South Carolina, 42; total, 153. Lumber and forest products, South Carolina, 3; total, 3. Tin cans, Georgia, 9 cars, South Carolina, 5; total, 14. Miscellaneous, which includes everything not included in a specific item, to Georgia, 1,362 cars, Florida, 261, South Carolina, 1,409; total, 3,032 cars. The total to Georgia, 7,970 cars. to Florida, 1,654 cars; to South Carolina, 4,541 cars, or a total south bound movement of 14,165 cars. A considerable portion of this traffic is traffic moved over our main line to Atlanta, but the bulk of it does not move to or through Atlanta; that is a very small share. The big end of the traffic I have shown moves in connection with the Southern Railway through this Piedmont territory, right through Charlotte or Spartanburg, for example, and carried over our own railroad to Augusta and beyond.

The North bound traffic shown by the statement is as follows: Furniture, from Georgia, 274 cars, South Carolina, 38; total, 315 cars. Cotton fabrics, from Georgia, 998 cars, Florida, 16, South Carolina, 893; total, 1,907 cars. Cotton and linters, from Georgia, 333 cars, Florida, 9, South Carolina, 564; total, 906 cars. Cotton seed meal, from Georgia, 291 cars, Florida, 3, South Caroline, 212; total, 506 cars. Cotton seed oil, from Georgia, 501 cars, South Carolina, 31; total, 532 cars. Lumber and forest products, from Georgia, 5,726, Florida, 720 cars, South Carolina, 4,427 cars; total, 10,693 cars. Oranges and grapefruit, from Georgia, 4 cars, Florida, 2,414; total, 2,418 cars. Peaches, from Georgia, 909 cars, Florida, 1, South Carolina, 7; total, 917 cars. Melons, (249) from Georgia, 1,101 cars, Florida, 692; total, 1,793 cars. Pineapples, from Florida, they having originated in Cuba, 2,265 cars; total, 2,265 cars. Cantaloupes, from Georgia, 4 cars; total, 4 cars. Other fruits and vegetables, from Georgia, 349 cars, Florida, 4,133 cars, South Carolina, 1,773 cars; total, 6,255 cars. Paper and pulp from Georgia, 153 cars, Florida, 8 cars, South Carolina, 2 cars; total, 163 cars. Stone and marble, from Georgia, 231 cars, Florida, 7 cars, South Carolina, 10 cars; total, 248 cars. Clay from Georgia, 809 cars, Florida, 115 cars, South Carolina, 538 cars; total, 1,462

cars. Merchandise, from Georgia, 221 cars; total, 221 cars. Miscellaneous, from Georgia, 2,011 cars, Florida, 960 cars, South Carolina, 814 cars; total, 3,785 cars. Phosphate rock, from Florida, 211 cars. Naval stores, from Georgia, 55, Florida, 15; total, 70 cars. Live stock, Georgia, 29 cars, from South Carolina, 1 car; total, 30 cars. Peanuts, from Georgia, 54 cars, Florida, 3 cars; total, 57 cars. Whale oil, from Florida, 48 cars; total, 48 cars. This is imported whale oil. Cotton factory products, that is, solid cars with cotton factory products handled through Pinners Point, Norfolk; from Georgia, 479 cars, South Carolina, 2,153 cars; total, 2,632 cars. Total cars from Georgia, 14,532, from Florida, 11,623, from South Carolina 11,283; Total, 37,438 cars. By combining the South bound and the North bound, we have a total of 51,603 cars, and doubling that gives a total of 103,206 cars for the entire year of 1930.

Our business in the entire territory which I have described is certainly 25 per cent below the average and we have no reason to believe that the second half of (250) the year will be better than the first half. It is certain that our business between the territories I have described during this year will be 25 per cent less than during the previous four or five years, so that during a normal year, having in mind the past four or five years, we handled from and to these territories at least 130,000 carloads of freight. The statement showing this traffic is the Interveners' Exhibit 6.

Of course, Interveners' Exhibit 6 shows only the handling of traffic by one of the three *turnk* lines, there being two others as I have mentioned; between these territories, I would say that the other two trunk lines handle substantially the same amount of traffic as we do, that is, each of them will handle as much as the Southern does. That is, the Seaboard and the Atlantic Coast Line.

The chief power of any railroad to trade traffic or negotiate divisions for the opening of through routes depends more largely upon the volume of business that it originates or delivers and can control in its own territory. There is a very heavy volume of business handled to and from the Piedmont Section and the P. and N. handles a very large share of it; that alone gives it a great influence in negotiating for the opening of through

routes and for favorable division. In practically all cases they have more than one connection and with their volume of traffic and their ability to control it to the one or the other connection, they have a very strong argument in favor of not only the opening of routes but the securing of a very favorable division.

CROSS EXAMINATION.

If the P. and N. should build a link between Spartanburg and Gastonia, it could very well handle the (251) traffic I have mentioned over the Norfolk and Western to Winston-Salem, the Winston-Salem Southbound to Norwood, and the Norfolk-Southern to Charlotte and the P. and N. to Greenwood and the Georgia and Florida, or the Seaboard or other connections beyond. The Winston-Salem South bound is owned one-half by the Atlantic Coast Line and one half by the Norfolk and Western, and its line extends from Winston-Salem to Wadesboro where it connects with the Atlantic Coast Line. I do not question, although I do not know it to be a fact, that the Winston-Salem South bound does not interchange traffic at Norwood with the Norfolk-Southern. I do not know about rates and divisions on this particular route I have referred to by Norwood. If the P. and N. built to Charlotte and undertook to force the South bound to participate in a route in which it would be giving the traffic to the Norfolk-Southern at Norwood, instead of taking it to Wadnesboro and giving it to the Atlantic Coast Line, the South bound might be short-hauling itself in mileage, but it might get the same revenue up to Norwood as it got to Wadesboro; that is, the point I tried to make, that with the power and tonnage of the P. and N. they could open up that route. I do not think that the P. and N. could force the South bound to short-haul itself. There is now a route covering this traffic generally by way of the Norfolk and Western, the Winston-Salem Southbound to Wadesboro, and the Atlantic Coast Line into Georgia, Florida and South Carolina. At present I think there is no route by way of the Southbound to Norwood and then the Norfolk-Southern into Charlotte.

I know of no contract that the Southern has with the Norfolk-Southern to give the Southern Railroad the

(252) traffic which the Norfolk-Southern moves into Charlotte going South. I do not know anything as to the physical property of the Winston-Salem Southbound and only in a general way as to the physical property of the Norfolk-Southern.

The next gateway shown on my statement for Southbound traffic is Potomac Yards. If the P. and N. should build a link between Spartanburg and Gastonia, they would not probably handle traffic through the Potomac Yards, but there are other Virginia gateways on an equality geographically with the Potomac Yards through which it could handle it. I think physically, from the Potomac Yards over the Southern Railway to Charlotte and then to the P. and N., if completed, and by it to Greenwood and connections beyond would afford a very good through route, but I should not think that the Southern Railway would want to release traffic at Charlotte and give it to the P. and N., not voluntarily.

As far as the movement of Southbound traffic through Spartanburg as a gateway is concerned, the construction of the line by the P. and N. North of Spartanburg would affect such traffic to certain territory, but not to the South of that. It could bring the traffic on up to Charlotte and give it to connections here, and that would open an entirely new route and new field. If the P. and N. only built to Charlotte, the only way to get traffic through the Winston-Salem gateway would be over the Southern or the Southbound and the Seaboard. I do not know whether the Southern would interchange any of this traffic with the P. and N. at Charlotte or not; don't think (253) it would release its long haul voluntarily, but there might be traffic involved which it could interchange with the P. and N. at Charlotte without material sacrifice in the long haul; that might be traffic on which it did not make any money, or it might make a trade with the P. and N. beneficial to the Southern. The main opportunity for any other way that it could move would be in the event the Southbound would be willing to release traffic at Norwood to the Norfolk-Southern by getting long haul instead of taking it on to Wadesboro; that would not be unusual. I don't suppose there is a railroad in the country that does not accept its short haul on a very large volume of traffic. At Charlotte, the Southern gives the Norfolk-Southern an opportunity to

secure some traffic by opening up the route and establishing rates and divisions.

The next and last gateway shown on my statement through which this Southbound traffic moves is Pinners Point. Unless it had good reasons for it, the Southern, when it had gotten traffic through Pinners Point, would not release it to the P. and N. at Charlotte unless it was profitable for it to do so. The Seaboard has a direct route by way of Hamlet to certain territory in Georgia, Florida and South Carolina from Pinners Point. The Norfolk-Southern now turns over to the Southern at Charlotte the traffic which it handles through Pinners Point gateway. I don't think I have before me the proportion of the 14,165 cars of Southbound traffic which was handled by the Norfolk-Southern during the six months period; it was a substantial number of cars; I think I can get the number for you today.

(254) My statement as to Northbound movement shows 2,632 cars of cotton factory products moving North through Pinners Point. It represents the number of cars which the Southern Railway handled Northbound from Pinners Point during the six months period. These cars originated in South Carolina and Georgia, the larger number from South Carolina; the Georgia traffic is scattered pretty well throughout the State. Some originates at Macon, Ga., some at Atlanta, and some at Griffin and Augusta. There is wide opportunity for the use of this through P. and N. route I have described on that Georgia traffic, and the logical route for it over the P. and N. would be through Augusta. The Southern Railway has cotton mills all along just North of Augusta and the local stations just out of Augusta in South Carolina. There is an opportunity for this cotton factory products traffic and there is a substantial amount of this traffic originating in territory where the Augusta route is the logical route. I cannot divide these 2,632 cars, but I would say a substantial share originated in that territory. I would say more than 100 cars. I am sure that a substantial amount of this traffic would continue to move through Columbia instead of through Augusta, but there is nevertheless that opportunity there.

If the Southern Railway has a traffic contract with the Georgia and Florida, I am not familiar with it; the G. and F. uses the Southern's bridge at Augusta. I do

not question the fact that in consideration of the Southern permitting the Georgia and Florida to use their bridge, that the Southern requires the Georgia and Florida to agree to make the Southern Railroad its preferred connection.

(255) The Southern would handle its business from Griffin, Georgia, through Atlanta. We would handle through Augusta a good deal of traffic to connections like the Central of Georgia, the Georgia and the Georgia and Florida. That is about the biggest end of the cotton factory products but from Griffin, for example, where the Central of Georgia also reaches, they have a line to Augusta and would naturally handle their eastern business that way and would have to deliver to some connection at Augusta because that is the end of their line. The Central of Georgia is a very big originator of cotton factory products.

H. L. HUNGERFORD testified for the Interveners:

I am Superintendent of Transportation of the Southern Railway, located at Charlotte. Have been in railroad work since 1884, coming up from telegraph operator through train dispatcher, chief train dispatcher, train master, superintendent of terminals, division and then general superintendent, and now Superintendent of Transportation. All of my work has been with the Southern Railway. At present my territory is from Washington to Atlanta and everything east, though not including the Atlanta-Florida line, taking in the States of Virginia, North and South Carolina and a part of Georgia. I have been in this immediate territory for the past 20 years. Was Superintendent of this division at the time the P. and N. was completed. It is a near neighbor of mine and I have observed its operations and method and manner of handling freight. They are a handler of freight and passenger traffic in this territory in a similar manner as we are. I have never been able (256) to see any difference in their methods and ours.

The P. and N. operates through freight trains and local trains from one terminal to another and it operates switching service at its yards in the same manner as we do. It serves industries on industrial tracks, warehouses on warehouse tracks. There are freight depots and pas-

senger depots from which it receives and distributes less than carload freight just like the Southern. Its methods of operation are similar in every way to the Southern Railway. It runs its freight trains about as fast as we run ours. Probably we are a little faster on our main lines, but from Greenwood to Greenville they have a little better railroad than we have, and they operate their freight trains just as fast as we could; between Greenville and Spartanburg we can run as fast as they can and between Gastonia and Charlotte, probably we can run a little faster and do it regularly. The longest train on the P. and N. I have ever personally seen had 65 cars and 2 motors; for heavy loads they couple up two motors when they have trains heavier than one locomotive can handle. Within the last 30 days I have observed foreign line freight cars on the P. and N. lines or at the yard. In the last 30 or 40 days, as I drive down from where I live I drive by the P. and N. freight yards on McBee Street to our stations, and in passing have observed foreign cars of 48 different railroads and privately owned cars of 13 different companies at that point, which is at Greenville. One day at Charlotte I accidentally noticed a car of the Chicago and Alton and one Maryland and Pennsylvania car. By privately owned cars, I mean they are owned by private companies which lease them to railroads; freight cars, refrigerator cars and tank line (257) cars. The foreign line cars which I observed came from territory located in Canada, all of the Western States on the Pacific Coast, the Middle Western States, Middle States, Northern, Eastern, Southern and Southeastern States, everywhere all over this country and Canada.

I have prepared a statement of our freight train movements covering a day, October 10, 1930, which is an ordinary day's business taken at random to show train movements and terminal movements in this territory, say, from Charlotte through Spartanburg, Greenville and down to Greenwood. It shows freight train movements between the different points. Take the first item, Greenwood to Hodges, and on down through the statement, together with the loads and empties which this train or engine had when it started its trip and the loads and empties it had arriving at its destination. On the entire area from Charlotte, inclusive, to Greenwood and

on down to Alston, there are 79 movements, or trains moving on this territory. This does not include passenger trains. This statement is the Interveners' Exhibit 7. It is a statement of one day's train and engine movements and gives the trains and movement on that whole territory, including Charlotte and Greenville. There were a total of 79 trains in both directions for that day. The Pinoca yards of the P. and N. is about four or four and a half miles from Charlotte; that is, their freight train terminal yard, and is about four miles from the freight house at Charlotte.

We have the time tables published by the Piedmont and Northern showing its scheduled trains; only two are now current, one for North Carolina and one for (258) the South Carolina division. The one for the South Carolina division is the Time Table No. 8, effective October 12, 1930; it has two schedule passenger trains in each direction between Greenwood and Spartanburg; three fast freight trains daily between Spartanburg and Greenwood in each direction, a local freight train in each direction between River Junction, which is their Greenville yard, and Greenwood in each direction. On the Belton-Anderson line they have one mixed train in each direction between Anderson and Belton carrying freight and passenger cars. This time table is the Interveners' Exhibit 8. Exhibit 9 is the time table, effective September 30, 1928, for the North Carolina Division of the P. and N. from Charlotte to Gastonia. It has no schedule freight trains on it, just three schedule passenger trains in each direction. They have a branch running from Belmont Junction to Belmont. There are no freight trains scheduled.

From my own knowledge and observation, if the P. and N. has freight to move at a time not covered under the scheduled trains, it moves it by the next train, and if there is more freight to move than the schedule trains can move they run additional trains, extra trains, just like we do. The flow of traffic and the needs of traffic control the number of extra trains. The P. and N. has freight tracks at Spartanburg serving their freight warehouse, team tracks, and various industry tracks; their Spartanburg yard is probably the smallest yard they have and is not a large yard. At Charlotte they have a very substantial yard, which is where the freight trains

are made up and broken up at Pinoca. I suppose that (259) yard could handle around 250 cars; this is also where they interchange with the Seaboard. This is an estimate on my part. At Greenville they have a good size yard that will hold 200 or 250 cars at what they call River Junction, which is a mile from their freight house yard and team tracks. That is where their through trains come in around Greenville from Spartanburg to Greenwood, going around the City of Greenville.

The P. and N.'s yards are equipped with modern conveniences, electric cranes, automobile platforms, everything that any other railroad has. At Greenwood their terminal and yard is a joint yard with the Seaboard, which the Seaboard operates jointly for the P. and N. and the Georgia and Florida. All freight goes to the same terminal and is interchanged from one track to the other by the S. A. L. switch engine; that is a joint yard; the Georgia and Florida goes into the same yard, and also the P. and N. and the Seaboard.

I know how some coal has moved to the Duke Power Company steam plant at Mt. Holly from the coal fields; I can't say as to all of it; I have seen some of that coal moving from the N. and W. through Durham, Durham and Southern where it would, of course, go to the Seaboard at Apex and they would handle it around by way of Hamlet and Monroe to Charlotte. I have seen some of these Durham and Southern trains leave Durham with the coal; of course, I kept no record of this, but observed it as a transportation man; Durham is in my territory. There have been vast quantities of building material shipped to the new Duke University at Durham; most of it has come over the Durham and Southern. This (260) came in over our industrial track to the new University. A great portion of this has moved over the Durham and Southern.

CROSS EXAMINATION.

Interveners' Exhibit 7 includes all of the trains operated within the territory between Charlotte, North Carolina and Greenwood, South Carolina; it includes trains, for instance, moving between Salisbury, North Carolina, and Atlanta, Georgia, that is, from Salisbury to Greenville but not south of Greenville, since when the

train reaches Greenville it becomes another train; they change the engine and everything as far as the train is concerned; it is another territory. I have frequently seen the Piedmont and Northern passenger cars. The picture you show me is the correct representation of a passenger car of the Piedmont and Northern; it is marked "Defendant's Exhibit A" for identification. I have seen a lot of the Southern Railway passenger trains. The picture you show me shows a Southern passenger train. It is marked "Defendant's Exhibit B" for identification.

The P. and N. passenger trains consist of an electric car with a self-contained motor. Most of the trains I have seen were two-car trains. The Southern trains are operated by a locomotive separate from the car; there are nine or ten cars in the train shown on the picture. Both the P. and N. and the Southern haul passengers from one end of the road to the other; they are in the same business, the railroad business. Steamboats haul passengers and also motor busses. I have seen a lot of the freight train of the Southern Railroad; the picture you show me looks like a pretty good freight train. It is (261) marked "Defendant's Exhibit C" for identification. I have seen quite a good many P. and N. freight trains, and the picture you show me looks like one of their trains. It is marked "Defendant's Exhibit D" for identification. Both the P. and N. and the Southern in handling freight move property in cars over rails and they both do the same thing in moving freight from one part of the country to the other; I meant that the P. and N. operation was just like any other railroad in that it moves freight in cars over rails all over the country, backwards and forwards, and that is what all railroads do. I know of only one way that a railroad can go into the freight business and that is in moving freight cars over rails. The time tables of the P. and N., of course, do not show the extra freight trains as they are not schedule trains. The trains of the P. and N. stop at all points along its line to pick up or deliver freight whenever they are directed to stop. The train with 65 cars on the P. and N. which I referred to as having seen, was about three years ago. It was coming North from Greenwood. I cannot say how many of the cars were empty. The doors were all closed. It was

a pretty heavy train. They had two motors and they had a hart time starting it; 65 empty cars would not be a very heavy train for two motors.

RE-DIRECT EXAMINATION.

The freight locomotives shown on the picture could be used for hauling passenger trains by the P. and N. if they wanted to; they are used mostly for hauling freight trains; do not recall having seen any of them hauling passenger trains; the passengers are carried in these cars, which have self-contained motor units mostly.

(262) RE-CROSS EXAMINATION.

I have never seen any passenger traffic hauled on the P. and N. by locomotive.

E. R. OLIVER, a witness for the Interveners, testified:

I am Vice President of the Southern Railway in charge of Traffic, and have been in the service of the Southern for 30 years, beginning in clerical work, through Assistant General Freight Agent, General Freight Agent, Freight Traffic Manager, and for the past six years Vice President in Charge of Freight and Passenger Traffic, with headquarters at Washington. For the past fifteen years I have been intimately connected with the section known as the Piedmont Section of North and South Carolina, first as Assistant General Freight Agent at Atlanta, then as Freight Traffic Manager of the Southern Railway System, and then as Vice President. I spend a lot of time in the Piedmont Section and am in almost daily contact with conditions existing in that territory. I am familiar with the Southern Freight Association, which is an association of railroad and steamship lines in the territory South of the Ohio, and Potomac Rivers, and East of the Mississippi; it handles our rate changes and in it we have discussed matters affecting traffic conditions; the various lines are members of this association, and it has frequent meetings; it has a standing rate committee which receives and analyzes proposals for rate changes throughout the entire United

States. The organization embraces two committees, the general committee in which various lines and steamship companies have representation, and the executive com-
(263) mittee composed of high-up traffic officials of various lines. The general committee handles all proposals that are objected to by individual lines. If a proposal is made and there are no objections to the proposed change, it is authorized after a lapse of fifteen days; if objections are made, it goes to the general committee and is considered by the lines as a whole. Rate proposals can be appealed from the general to the executive committee where they are considered by the higher traffic officials of the lines that are members of the organization. If approved by the committees, such proposals are immediately authorized for publication; a disposition advice is issued by the chairman, which goes to the various publishing agents or to the individual lines; by publication is meant the actual filing with the Interstate Commerce Commission in accordance with law, which makes it a published tariff and effective according to notice, which is usually 30 days.

The P. and N. is a member of the Southern Freight Association and has membership on both the general and executive committees in the person of Mr. J. S. Cureton, Traffic Manager, on the executive committee; and Mr. L. R. Lawson, Assistant General Freight Agent, on the general committee. The P. and N. has the same vote as the Southern Railway in the Association.

The Southern Weighing and Inspection Bureau is an organization set up by lines in the territory just described and might be described as a policing bureau with inspectors located throughout the territory who inspect freight shipments to see that they conform to the tariffs and classification as to weight, packing, etc. It also
(264) supervises and checks weights of carload and less than carload freight to see that the carriers get freight charges on the weight of the articles distributed. It also checks and polices transit tariffs which are tariffs which authorize stopping of goods in transit for storage, manufacture, etc., and sees that the tariff rates are assessed. The Piedmont and Northern is a member of this Bureau.

The Southeastern Demurrage and Storage Bureau checks and policies the applications of the tariffs on de-

murrage and storage charges; it checks the detention of the cars unloading and in process of being loaded and sees that tariff charges are assessed when an extra amount of time is consumed, and also with reference to detention of carload freight in freight stations. Its functions cover the Southeastern territory; the P. and N. is a member of that Bureau. The per diem agreement is the agreement of all lines with respect to payment to each other for hire of equipment, usually $1.00 per day, and it extends throughout the country at large; the P. and N. is a participant in that agreement just as is the Southern Railway. If a foreign car is on the line of the P. and N. and the car is out of order, the P. and N. has facilities and does repair such car; if it becomes in bad order on the P. and N. that line must put it in condition to pass inspection at the interchange point with the connecting line from which the car was received.

I have analyzed the freight tariff of the P. and N. in Index No. 20 and this shows that the P. and N. publishes and files with the Interstate Commerce Commission 17 individual tariffs under its own series; it is a (265) party as initial carrier in 184 tariffs published by various agencies or other individual roads; for economy and convenience the carriers throughout the South and throughout the country have established common agency tariff bureaus; these agencies take care of the formality of filing tariffs with the Interstate Commerce Commission and seeing that they are properly filed. The individual roads issue their powers of attorney to these agents which perform all of the functions that the individual road itself would perform, and file the tariffs with the Interstate Commerce Commission; the publishing agents under proper powers of attorney prescribed by the Interstate Commerce Commission perform all of the functions that the individual railroad may perform.

The P. and N., as initial carrier, is a party to 184 tariffs published by agencies or by other railroads, which means that in addition to giving powers of attorney to these agencies, they have also in certain cases given powers of attorney to other railroads that publish tariffs.

This tariff list also shows that the P. and N. is a

participating carrier in 364 tariffs filed with the Interstate Commerce Commission to the extent of being a delivery or intermediate carrier, which means that roads publishing rates to points on or via the P. and N. do so under appropriate powers of attorney and that the tariff is binding on the P. and N., and filed with the Commission by the publishing road, which road holds the concurrence of the P. and N. in the form of a power of attorney, referred to in the tariff itself. Under the rules of the Interstate Commerce Commission, the P. and N. must file a list of these tariffs with it, and it did (266) this in its Tariff Index No. 20. My analysis of this index shows that the scope of these tariffs, broadly speaking, embraces the entire country, the P. and N. being a party to the tariffs from and to the Pacific Coast, from and to New England, the Middle West, the Rocky Mountain States, the South, the Gulf of Mexico, the North Atlantic and South Atlantic ports, which latter tariffs, in many instances, apply on export and import traffic. The P. and N. is a party to these tariffs, which apply throughout the length and breadth of our land.

The P. and N. is a party under proper power of attorney to certain publications of national scope, the mileage, rates, rules and regulations governing payment of mileage on cars of private ownership, American Railway Association Freight Traffic Bureau, Mileage Tariff No. 7, Railway Equipment Register; official list of open and prepay stations, National Perishable Freight Committee, Perishable Protective Tariff No. 5; Demurrage Rules and Charges, and the Southern Classification No. 49. These tariffs all have application throughout the country at large and the P. and N. is a party to them just as are all other lines; these tariffs are all officially filed by these publishing agents with the Interstate Commerce Commission under appropriate powers of attorney from the various roads.

FX-1 Power of Attorney is the form prescribed by the Commission, which means that the P. and N. has made a certain individual its agent for the publication and filing with the Commission of these rates, rules and regulations; the Commission has prescribed a number of forms of powers of attorney, some of which are re-
(267) stricted, but FX-1 is of general application, making the agent, in fact the Piedmont and Northern Rail-

way Company for the purpose of giving the agent unrestricted power to file tariffs on behalf of the principal. FX-1 does prescribe the territory in which the agent has authority to act.

At common points the P. and N. switches for other lines and other lines switch for it. Accordingly it has filed with the Commission its switching and absorption Tariff No. 5, which covers the rules and regulations under which the P. and N. switches for other lines, and the extent to which it would absorb the charges of other lines. This is required of carriers by the Commission. The P. and N. switches for the Southern Railway and the Southern Railway switches for the P. and N. in large quantities. The P. and N. switches to a number of industries over tracks owned by the Southern, particularly in the section between Spartanburg and Greenwood where the tracks we had previously built to the industries were electrified so that the P. and N. could operate into these industries over tracks we had built and which are still owned by us.

The P. and N. serves industries individually in many instances. It has industries located on its tracks exclusively, and to and from these industries it switches for the Southern Railway and other lines, just as we have industries located on our line exclusively which we switch for the P. and N.

I am familiar with the personnel and the managerial and traffic officers and commercial agents of the P. and N. It has a traffic manager at Greenville, Assistant Traffic Manager at Cincinnati, General Freight and Pas-
(268) senger Agent at Greenville, Assistant General Freight Agent at Greenville, Division Freight Agent at Charlotte, Commercial Agents at Charlotte, Gastonia, Anderson, Greenville, Cincinnati, Spartanburg and Atlanta, Division Passenger Agent at Greenville and General Eastern Agent at New York. This is the same information heretofore testified to from the Railway Guide.

This organization competes for traffic throughout the country where the P. and N. can secure a haul, either as an originating, delivery or intermediate carrier. Mr. E. Thomason is President and General Manager of the Durham and Southern and Vice President and General Manager of the Piedmont and Northern. F. E. Lagerholm is Assistant to the President of both lines. W. T.

Gill is Assistant to the General Manager of both lines. J. S. Cureton is the Traffic Manager for both lines. C. T. Brown is Assistant Traffic Manager for both lines. E. B. Hardin is Auditor of the P. and N. and General Auditor of the Durham and Southern. J. V. Sutton is Chief Claim Agent for both lines. J. P. Robery in New York City is General Eastern Agent for both lines. C. A. Houston, Cincinnati, is Commercial Agent for both lines, W. B. Atkins, Atlanta, is Commercial Agent for both lines.

I do not of late know anything about the physical property of the Durham and Southern; it is about 50 miles long, runs from Durham to a connection with the Seaboard at Apex and comes down and crosses the Norfolk-Southern. Its a rather old road, certainly built prior to 1910; think it was built about 1905; don't know whether it was built as a part of the Duke program. It was always affiliated with the American Tobacco Company and with the Duke interests in that section.

(269) Mr. Cureton files proposals with the Southern Freight Association in behalf of the Durham and Southern Railway, as its Traffic Manager. The Durham and Southern is not a member of that Association. I assume Mr. Cureton files such proposals in that capacity. These proposals affect rate changes in which the Durham and Southern is directly interested. The Durham and Southern runs to Dunn where it connects with the Coast Line and crosses the Seaboard at Apex and the Norfolk-Southern at Varina.

Tariff Index No. 20 of the Piedmont and Northern also lists passenger tariffs of that road, which I have analyzed. My analysis shows the P. and N. is a party to common tariffs issued in the Southeastern Passenger Association applying throughout Virginia and the Carolina territories, and also applying from and to points on its lines and the territory as a whole. Here again the lines have gotten together and published joint passenger tariffs through a common publishing agent and the P. and N. is a party to those tariffs. These tariffs as to points throughout the country as a whole. The P. and N. is a party to all of the passenger fares that apply to and from this territory, just as is the Southern Railway. They publish winter tourist tickets, stop-over en routes tariffs, and I notice special tariffs applying to Havana, Cuba. They are parties to the sleeping car

tariff and the ticket redemption tariff; they have joint through arrangements with other connecting carriers for checking baggage; they check baggage throughout the country; that is the country at large. A passenger could check his baggage at Spartanburg to New York (270) by the Seaboard, or to San Francisco. The P. and N. offers at its stations for sale joint through passenger tickets covering territories throughout the United States. The blue or green flier which you hand me, Interveners' Exhibit 10, is an advertisement of a special excusion fare to Washington, D. C., May 29th, 1930. It is issued by the S. A. L. and shows round trip fares from points on the P. and N. at Anderson, Greenville, Hodges and Spartanburg. The blue flier is Interveners' Exhibit 11, and is an advertisement of a special low fare to Portsmouth and other points in Virginia from stations in North and South Carolina, for May 30, 1930; was issued by the S. A. L., and shows round trip fares in North and South Carolina on the P. and N. from Anderson, Greenville and Spartanburg. The paper which you show me and which is Interveners' Exhibit 12 bears the P. and N. symbol at the top and is headed "Express Service at Freight Rates"; it is a circular issued by the P. and N., advertising its daily merchandise package car service from principal producing and distributing points. Shows schedules from various points of origin to Gastonia; these points of origin being from Atlanta on the South to New York and Chicago; after each point of origin is given the routing, that is the railroads over which shipment will move, and then the number of days scheduled for the movement. These points of origin include Atlanta, Baltimore, Birmingham, Boston, Charleston, Charlotte, Chattanooga, Chicago, Cincinnati, Louisville, Memphis, Nashville, New Orleans, New York, Norfolk, Philadelphia, Portsmouth, Providence, Richmond and St. Louis. This means the operation of through (271) daily package cars of freight. The package car is the through package car operated for the accommodadation of merchandise freight traffic. In connection with the coastwise steamship lines to Norfolk, it means the freight would come to Norfolk over steamship lines and a package car would run from Norfolk to Gastonia; it means further, that in a big central line from Chicago,

the initial line would load a through package car to break bulk with the P. and N. here for Gastonia.

I have had an opportunity of observing and have observed and know the method and manner of handling freight business by the P. and N. The P. and N. maintains freight stations for receipt and delivery of merchandise just as we do. It maintains team tracks for receipt and delivery of carload traffic just as we do, which tracks are equipped with unloading facilities as are cars. Only last week I observed the unloading of a carload of heavy pipe on the team track of the P. and N. in Spartanburg by an electric crane. This pipe was shipped in from the Birmingham district. The P. and N. serves outlying industries individually and in common with other lines as we do, and makes a pick-up and delivery service from and to these industries as we do. These industries are authorized under tariffs of the P. and N. as well as under our tariffs to load merchandise to distant break bulk points where it is distributed; this comes under the head of pick-up service. Merchandise is assembled in freight houses of the P. and N. and of the Southern and switched out to these outlying industries, thereby affecting delivery service. Outside of the motive power I have been unable to observe any difference whatever between the method of the P. and N. and that of the Southern Railway in handling a pick-up and delivery (272) service. They operate their locomotives by electricity; we operate ours by steam.

As Vice President and Traffic Manager of the Southern, I am in charge of the traffic solicitation force and have knowledge of what competitive difficulties we meet in any particular area. My experience has been as to traffic moving to the steam plants of the Duke Power Company, for example, when the traffic could move over the P. and N., for instance, at Greenville, where the P. and N. could handle the business, the routing is invariably by the P. and N. I do not have a list of these plants, but I recall the Greenville plant in particular. The Duke University Buildings at Durham are located near the Southern Railway and we constructed a side track to handle building materials for it. Whenever it was possible as to competitive traffic, the Durham-Southern was favored and used to compete with the Southern. I don't think we got any of it that the Durham-Southern

could possibly handle. Some of the business originated at local points and we hauled this into Durham because the Durham and Southern could not handle it, but as to materials coming from distant points, for instance, Indiana, where they got their building stone, it was invariably routed by he Durham and Southern. The Durham and Southern got most of this building material from the S. A. L. and that was a circuitous route. The routing was usually down the Clinchfield to Bostic, thence by the Seaboard to Apex and the Durham and Southern through Charlotte and Hamlet.

Most of the coal for the Duke Power Company's Mt. Holly steam plant comes from points on the Norfolk and (273) Western in West Virginia, and in my experience the routing has been over the Norfolk and Western through Lynchburg to Durham, over the Durham and Southern to Apex, over the Seaboard to Hamlet to Charlotte and Pinoca, and from there by the P. and N. to Mt. Holly. On that haul the Durham and Southern and the P. and N. each get a part of the haul. By this route the distance from the coal fields is very much greater than by the Norfolk and Western to Winston-Salem and the Southern lines from Winston to Charlotte. The Norfolk and Western line to Winston leaves their main line at Roanoke and we then have a short route from Winston-Salem to Charlotte where we connect with the P. and N. Instead of using that route they carry the tonnage through Lynchburg, then by a branch line of the Norfolk and Western to Durham, thence over the Durham and Southern. I don't have a comparison of the mileage of the two routes.

The existing joint through routes open to and available to and used by the P. and N. on its present line are as follows: First, with reference to the North Carolina Division. These routes to and from the East are by Pinoca and the S. A. L. to Richmond or Portsmouth; at Richmond the S. A. L. connects with all rail lines to the East, to the Potomac Yards; thence by the Pennsylvania and B. & O., by Pourtsmouth they connect with the Pennsylvania to the East and also in connection with the coastwise steamship lines. At Norfolk they put cars on car floats and put them across the bay, and from there by all rail to New York, Philadelphia; there is quite an interchange of carload traffic with the Penn-

sylvania at Norfolk; they go over on car floats to Cape Charles, thence over the Pennsylvania Railroad, which now owns and operates the New York-Philadelphia and
(274) Norfolk Railroad.

The next route, by Charlotte and the Norfolk-Southern; the Norfolk-Southern operates from Charlotte to Norfolk where it connects with the Pennsylvania for all rail traffic to and from the East, and also the coastwise steamship lines to Baltimore, Philadelphia, New York and New England.

Third, by Charlotte and the Southern Railway. The Southern connects at Winston-Salem with the Norfolk and Western, at the Potomac Yards with the Pennsylvania and the B. and O.; at Pinners Point with the Pennsylvania to the East all rail and with coastwise steamship lines. To and from the West they have routes by Pinners Point and the S. A. L. and its connections, the Clinchfield through Boston and then in connection with the Norfolk and Western beyond the Clinchfield and also the C. and O. beyond the Clinchfield at Elkhorn City. They also have a route to the West by the Seaboard through Atlanta and its connections throughout the entire Western and Southwestern territory. They also have a route by Charlotte and the Southern Railway.

Referring to the South Carolina Division, Spartanburg to Greenwood, the routes to and from the East are in connection with the Seaboard by Greenwood and its connections; they have a route by Spartanburg and the Southern; to and from the West we have routes by Greenwood and the Seaboard through Atlanta and its connection; by Spartanburg and the Southern; by Spartanburg and the Clinchfield and its connections; through the Norfolk and Western and the C. and O. The South Carolina Division to and from the South, which would in-
(275) clude Florida and Georgia by Greenwood and the S. A. L. and its connections; by Greenwood and the Georgia and Florida and its connection through Augusta, which would embrace the Georgia and Florida South of Augusta, and also the line of the Georgia Railroad, the Central of Georgia and its connections. We also have the route by Greenville and the Southern. The South Carolina Division also has overhead routes, by

which I mean they use this line between Greenwood and Spartanburg as a part of a through route between the Clinchfield on the North and the Georgia and Florida on the South and through the Georgia and Florida with its connections at Augusta, particularly the Central of Georgia and the Georgia Railroad and its connections through the Southeastern territory. This refers to the present unextended lines of the P. and N.

I have had prepared a map to illustrate my further testimony as to the new joint through routes that would be opened up to the P. and N. should the first and then the other of these extensions referred to be built. As is shown by the map, the construction of the line between Spartanburg and Gastonia will immediately make available a through route to Augusta and points South via Greenwood, Greenville, Spartanburg, Gastonia and Charlotte; thence in connection with the Norfolk-Southern to and from the East. The Norfolk-Southern line is shown on the map in purple; it operates from Charlotte to Norfolk where it connects with the Pennsylvania, shown in yellow, and also with the coastwise steamship lines to Eastern ports. The Georgia and Florida is shown in green on the map; it operates from Madison, Florida, through Augusta, Georgia, to Greenwood where it connects with the P. and N. The P. and N.'s proposed line from Spartanburg to Gastonia is a broken line and the existing line is a solid red one. At Charlotte the (276). solid red line connects with the Norfolk-Southern, which runs to Norfolk and Suffolk. The effect of the construction from Spartanburg to Gastonia would make available a through line or route from Madison, Florida, to all of this Northern and Eastern territory.

The Norfolk and Western is represented on the map by orange lines which run from Winston-Salem, Durham and Suffolk to the Middle West via Columbus and Cincinnatic. The arrows at the top of the map indicate gateways. At Columbus and Cincinnati the Norfolk and Western connects with all of the principal lines in that territory that radiate out in fan shape and reach all of the Middle West and the Northwest Section of the United States. The map shows the Norfolk and Western to Hagarstown, Maryland, where it connects with such lines as the Pennsylvania, the Baltimore and Ohio, the Reading and the Western Maryland, which

reach out in fan shape to the entire Eastern and New England territory. The yellow line is the Pennsylvania, which operates up from Norfolk to Philadelphia and on to the entire Eastern section, including New England.

Referring to the Augusta area, the light blue line is the Savannah and Atlanta; it runs between Camak, Georgia, and Savannah, crossing the Georgia and Florida at St. Clair. This would be a through route from and to Savannah in connection with the P. and N. that is made available to it by merely building the one connection from Spartanburg to Gastonia. That is a railroad which originates considerable traffic. It has a port at Savannah. The lines shown in black in Georgia and Alabama are the lines of the Central of Georgia, (277) which reaches the Western gateways of Birmingham and Montgomery, and also many cities, like Atlanta, Macon, Americus and Columbus. Its eastern terminus is Augusta; it has no lines North or East of Augusta, and, of course, would be available there to the route of the Georgia and Florida and thence to Greenwood in connection with the P. and N. and beyond. The Central of Georgia has a line from Bremen, Georgia, not shown on the map, west of Atlanta, through Rome to Chattanooga, Tennessee. I left that line off the map because the route from Chattanooga via Augusta would be unduly circuitous; by "unduly", I mean traffic would not move that way; it would be too circuitous to attract traffic. I have put on the map all of the system of the Central of Georgia which, in my opinion, would be tributary to the new routes.

I put the purple line on the map from Norwood to Winston-Salem to show the route of the Winston-Salem Southbound in connection with the Norfolk-Southern to and from Charlotte, or between Winston-Salem and Charlotte. The Norfolk-Southern connects with the Winston-Salem Southbound at Norwood and that line runs North to Winston-Salem, thereby giving the Norrolk-Southern and the P. and N. a route from Charlotte via Norwood to Winston-Salem in connection with the Norfolk and Western; the Norfolk and Western has a direct line from Winston-Salem to Hagarstown, Maryland, and lines west from Roanoke to their principal gateways in the West, Columbus and Cincinnati. In my opinion, as a traffic man, if the P. and N. should build an ex-

tension from Spartanburg to Gastonia, the through physical connection from the railroad South of Greenwood via the P. & N., as extended to Charlotte, then to Norwood by the Norfolk-Southern, and from Norwood to Win-
(278) ston-Salem by the Winston-Salem Southbound, and to points North, East and West by the Norfolk and Western, would constitute a reasonably direct through freight route. As to whether it would be permissible or not, the lines can readily agree to it.

Assuming that in addition to the line from Spartanburg to Gastonia, the P. and N. should also build a line from Charlotte to Winston-Salem, I have illustrated the proposed line to Winston-Salem by broken red lines showing connection at Winston-Salem with the Norfolk and Western, indicated on the map in orange. It shows the direct routes of the Norfolk and Western North of Winston through Roanoke to the East and West; and there is no circuity to that route, it is a direct route, and when the Norfolk and Western gets to Hagarstown it connects with the eastern lines radiating from that gateway. The Norfolk and Western handles through freight entirely on its own track from Winston-Salem to Hagarstown, being the line that runs through the Valley of Virginia. The map shows the direct line of the Norfolk and Western to the Ohio River at Kenoba, which is an important gateway where it connects with the Detroit, Toledo and Ironton; it connects with the B. and O. at Kenoba and at Portsmouth it has its own line by connections with the B. and O. and the C. and O., radiating from that crossing; at Cincinnati it connects with all of the principal Middle Western lines, such as the B. and O., Pennsylvania, C. and O. and New York Central, so that through those wateways of Kenoba, Portsmouth and Cincinnati, the entire Middle West territory is available. In my opinion, with both of the proposed extensions the new route would undoubtedly constitute an effective new trunk line through the Southeast; as a prac-
(279) tical railroad operating matter, it would constitute a new through trunk line between the East and the Middle West on the one hand, and the South and Southeast on the other, competing for business that may now move into and out of this territory with the three existing lines.

I have undertaken as best I could to arrive at a general estimate of what, in my opinion, would be the reve-

nue lost to the intervening steam railroads due to the proposed extension of the P. and N. The lots to the steam railroads would be very great. I assume that the P. and N. knew what it was about when it filed its supplemental answer to the questionnaire, and that the figures therein set out represent what it expects to accomplish. Those figures show that with the first year after the completion of these extensions, they propose to handle additional traffic to the extent of 82,320 carloads; that is new traffic by reason of these extensions; it shows they expect to earn during the first year, $3,890,016.57 of additional revenue, that amount increasing progressively at the rate of 8.4 per cent each year until during the sixth year they estimate their additional new revenue shall be $5,822,344. In dealing with these figures account must be taken that the haul of the P. and N. will be limited by its length, the maximum distance being from Winston-Salem to Greenwood; the other railroads in this section have rails and the ability to haul this traffic for much greater distances, for example, the Southern would distribute this traffic to and from distant gateways, for instance, Potomac Yards and Norfolk on the East, Cincinnati, Louisville and St. Louis on the West, Memphis and New Orleans in the Southwest, (280) Jacksonville in the Southeast, so that in measuring our loss we can not be confined to the gain of the P. and N. because our loss is going to be very much greater. I am now speaking particularly as to the Southern Railway, but before I conclude would like to include the lines of all the other interveners.

The P. and N. will get a little bit of it and we will lose more by reason of the Norfolk and Western and other railroads getting what we get now. I assume that if the revenue of the P. and N. the first year will be $3,890,000, which they said it would be, that the Southern Railway's loss on that traffic would be at least twice that sum, and that it will be twice the amount of the gain of the P. and N. each year up to the $5,822,000, as estimated for the sixth year, because as to all of this traffic, and the vast majority of it is long haul traffic, we would haul it to these distant gateways and junction points, whereas the P. and N. would haul it to Winston-Salem and deliver it to the Norfolk and Western; that portion of the revenue accruing to the Norfolk and West-

ern would be directly at the expense of the Southern, which now participates in this traffic for these long hauls. That is assuming that they give it to the Norfolk and Western, and the P. and N. would not get the revenue shown by them out of it unless they get the maximum length of haul on their line. The loss to the other intervening carriers would be in addition to the loss I have undertaken to estimate for the Southern. I believe we would be safe in estimating our loss at not less than twice their expected gain. In return to the question-
(281) naire, the P. and N. made no estimate of the amount of gain in traffic it would make if it only built the line from Gastonia to Spartanburg. At that time they admitted they were asking for a certificate for both extensions. In the absence of such an estimate I will say that the proposed length between Gastonia and Spartanburg could reach all of the industries of any consequence on the line of the Southern between Spartanburg and Gastonia, and we have a number of substantial industries on that section of our line. In the second place, it would enable the P. and N. and its connections to the North and South to engage in handling this through traffic which has origin or destination in the North and East, and in the South in the territory beyond Greenwood and Augusta. There is a very large volume of that traffic and I expect, of course, that the P. and N. will actively compete for it if it should build this extension, and would use all of the influence at their command to control the business to this new through route. I can only estimate the loss that will result to the Southern, but undoubtedly it would be substantial. I think the loss of business in the intervening territory would be substantial and that it would be certainly, not less than one-half million dollars a year on that one item, without considering the overhead traffic which is rather harder to estimate. Of course, there is a vast volume of overhead traffic and the P. and N. would compete for control for full participation in that movement. According to the supplemental answer to the questionnaire, they estimate their overhead traffic at not less than 12,000 cars per annum, in case both extensions were built, but the same volume of traffic
(282) would be available to them if only one extension is built, so that, in my opinion, the loss to the interven-

ing carriers would be not less than two million dollars a year on this overhead traffic.

In 1928 our local traffic amounted to 30.7 per cent in tonnage, and 31.6 per cent in revenue. Of the total Southern Railway Company traffic in 1929, the percentage was 29.4 per cent in tons and 30.8 per cent in revenue. For the seven months' period of 1930, the percentage was 28.7 in tons and 30.2 in revenue.

The map referred to by the witness is the Interveners' Exhibit 13. In attempting to make the estimate in the loss of revenue to the intervening railroads in case the P. and N. completes its extension, I did not include in the estimate the loss to the so-called Clinchfield Lines.

CROSS EXAMINATION.

I don't know whether all electric railways engaged in the general transportation of freight are members of the Southern Freight Association or some similar association. You show me a copy of the Railway Equipment Register; it gives an index of the carriers which are parties to the Registter. The index contains the names of the Aurora and Fox River; the Bamberger Electric Railway Company is a party; also, the Bangor Hydroelectric Railway; the British Columbia Electric Railway Company, and the Cedar Rapids and Iowa City Railway Company is a party, and the Central California Traction Company and the Fort Dodge, DesMoines and Southern Railway Company. I am not familiar with any of the roads which have just been mentioned. The Register shows the equipment of the Ft. Dodge, DesMoines and Southern Railway; it has a total of 556 box cars, 20 (283) stock cars, 66 coal and 18 coal and ballast cars, 8 ventilated cars, 12 electric locomotives. The road has a total of 151.5 miles. Some of the other railroads like the Pennsylvania, are partly electrified. The Chicago, Indiana and Louisville Railway is not an electric road; it is a party to the Register. In a general way I am familiar with the Chicago, South Shore and South Bend Railway, which is a party to the Register; think it is operated by electricity. There is nothing in the Register to indicate that the Arkansas Valley Interurban Electric Company is an electric railway other than the

name. I am not familiar with it. The name of the Electric Short Line Railway Company, a party to the Register, would indicate that it is an electric line. Without going through the list, it would appear from this book that a number of electric railroads are parties to the Equipment Register. I don't know to what extent electric railroads are generally parties to the Traffic Associations and Bureaus to which I have referred. The Register shows that the Pennsylvania Railroad has 56 electric locomotives; it does not give their weights or tonnage rating or axle loading, or any detail description of the locomotives. It shows that the Virginian Railway has 14 electric locomotives, but does not give their weight, etc. I know that the Virginian Railway converted a large part of their line from steam to electricity as the Norfolk and Western has done in the coal fields, and also some lines in the West. I remember that the Chicago, Milwaukee and St. Paul operate electric locomotives over, I think, several hundred miles of its line. I don't know the character of the electric locomtives or the voltage used.

(284) The equipment register shows that the Cincinnati and Lake Erie is an electric railroad and has 46 electric locomotives and a total of 214 motor box cars and trailer box cars and trailer gondolas and a very few flat cars. It has a mileage of 289 miles. In a general way I am familiar with the Illinois Traction Company; it is operated by electricity; think it has about 600 miles or more of mileage; it does quite a passenger business; operates dining cars, sleeping cars and trailer cars; has been in operation for a number of years; I don't know about its freight business. The Register shows the Southwestern Missouri Railroad Company, and that it has three electric locomotives; has mileage of 94 miles; has 39 electric cars; has no freight equipment according to the Register; shows its connections with steam railroads, with the Kansas City Southern, Missouri Pacific, Frisco, Kansas, Oklahoma and Gulf.

There are a number of tariffs published which cover a very wide area; they have a very wide scope as to destination usually; their origins are more restricted. If a carrier desires to handle any traffic within the scope of that tariff, it must become a party to the tariff. For instance, if the P. and N. desires to participate in traffic

from Spartanburg to a point West of the Mississippi River, or to the Pacific Coast, it would have to become a party to that tariff, even if it only had to handle a car ten miles on the way; it and its connections would form a through route. If the P. and N. wanted to handle a box of hats from a station ten miles from Greenwood and give it to the Seaboard, it would have to become a party to that tariff, which might extend to the Pacific (285) Coast. Any carrier which desires to sell a ticket for an interstate journey, or check a trunk on a long trip must become a party to the Southeastern Passenger Association. I think the P. and N. is a party to it; I think you were a member, but I think you resigned a little while ago, but the P. and N. is a party to all of the Southeastern Passenger Tariff Bureau tariffs.

All of the coal moving to Mt. Holly that I have been able to get a line on has moved over the Durham and Southern when it came from the Norfolk and Western, when it originated with the Norfolk and Western and could get around to Durham; of course, some coal may have originated on other lines than the Norfolk and Western. I don't know that it is a fact that during the years 1927, 1928 and 1929 and up to the present in 1930, there were moved to Mt. Holly 3,528 cars of coal and that of that number only 308 moved over the Durham and Southern. I don't know those figures to be correct. I don't know how many cars of coal moved to Mt. Holly, but I do say that all of the coal that the Mt. Holly plant got within the last three years that came from off the Norfolk and Western was hauled around through Durham over the Durham and Southern to Apex. You may have brought coal from other origins on other railroads. The Norfolk and Western line terminates at Durham; the only line that the Norfolk and Western could give it to would be the Seaboard, or the Durham and Southern, or the Norfolk and Southern, but they could give it to the Seaboard at Winston-Salem in a more direct route. I have no information that the Seaboard line from Durham to Apex is in such poor physical condition that coal can not move over it. As I un- (286) derstand, the Seaboard has a very indirect route from Durham to Apex. I think the Seaboard can handle coal from Durham to Henderson over its line. My contention is that the logical route for that coal is from

Winston-Salem, then to Charlotte over the Southern Railway. I don't know how much coal has moved into the Mt. Holly plant in the last three years. I know that a substantial part of that coal which the Mt. Holly plant gets moves over the Durham and Southern Railroad, that when it originates on the Norfolk and Western that is the route it moves over, and I think this is also true as to coal that originates on the C. and O. They give it to the Norfolk and Western at Lynchburg and it hauls it down to Durham where the Durham and Southern gets it. I can not say that in the last three years any coal moved from the C. and O. into Lynchburg, nor as to how many cars moved over the Durham and Southern into Mt. Holly. The coal which I say moved to Mt. Holly over the Durham and Southern was coal from off the Norfolk and Western.

Mr. Thomason is President of the Durham and Southern and his hedquarters are in Charlotte. The Durham and Southern has a general freight passenger agent at Durham, but Mr. Cureton, the traffic manager's office, is at Greenville. I think the general offices of the Durham and Southern are where the President is located in Charlotte. I don't know whether the Government has recaptured earnings from the Durham and Southern or not, although I notice its earnings are pretty heavy.

Referring to Interveners' Exhibit 13, among other routes over which traffic might move, I said was the
(287) Central of Georgia, and the lines of the Central of Georgia are shown in black on the exhibit. In order for traffic to move in connection with the Seaboard and the Central of Georgia, the Central of Georgia would have to give it to the Georgia and Florida at Augusta and the Georgia and Florida would give it to the P. and N. at Greenwood and the Seaboard would not handle it at all. I don't know whether the Central of Georgia has refused to work through Augusta with the Geogia and Florida, and that it works only with the C. and W. C.; their line goes up to Augusta and stops and if they work with the C. and W. C. and not the Georgia and Florida, it would be a clear case of discrimination. I don't think they have refused to work with the Georgia and Florida. My information is to the contrary. I don't think that the Central of Georgia has

imposed restrictions on traffic moving through Augusta on the South and through Spartanburg on the North in connection with the Clinchfield, or has imposed such restrictions that it will only work with the C. and W. C. in handling that traffic; I think that is not true. If the Central of Georgia had refused to route movements through Augusta via the Georgia and Florida and the P. and N. through Spartanburg, in connection with the Clinchfield, I would know it, and I don't know it.

So far as I know, the P. and N. has always lived up to its contract with the S. A. L., and that contract requires the P. and N. to treat the Seaboard as its preferred connection at Charlotte and Greenwood, and so far as I know, as a matter of traffic fact, the P. and N., as to this territory, is substantially a part of the Seaboard Air Line. I am pretty well convinced in my own (288) mind that if the P. and N. completes this line from Spartanburg to Gastonia, it would immediately start handling overhead traffic. I know that the P. and N. has vigorously opposed the effort of the A. C. L. to close certain routes through Augusta in connection with the Georgia and Florida, and that it intervened before the Interstate Commerce Commission to oppose the effort of the A. C. L. and its family line, the C. and W. C. and they could have had only one purpose in that connection, namely, to participate in this through overhead traffic between the North and South, traffic moving between Greenwood and Spartanburg in connection with the Clinchfield. The A. C. L. undertook to close certain routes and the P. and N. vigorously objected and was successful in its objection. It is admitted that the Interstate Commerce Commission did not oppose the construction of the Georgia and Florida from Augusta to Greenville.

CROSS EXAMINATION.

By Interstate Commerce Commission:

The equipment register referred to merely states the number of electric locomotives belonging to the various lines which I named. It does not state the uses to which they are put. The Register also shows the equipment in the way of steam locomotion. The items which I read at the request of the counsel for the defendant

are only those items in regard to electric locomotives and freight cars; some of the companies whose equipment is listed in that register are principally operated by steam.

RE-DIRECT.

The equipment register shows in reference to the (289) Illinois Terminal Railroad System a dotted line from East St. Louis to Grafton, Illinois; that it is a freight line, steam operated; also a freight line, steam operated from East St. Louis to Detroit, and a third freight line, steam operated from Edwardsville, Illinois, to a point South of East St. Louis, so that the Illinois Terminal Railway System has three lines that are operated by steam; the Illinois Traction Company referred to is one of the Illinois Terminal Railroad System's lines.

RE-CROSS EXAMINATION.

The Illinois Terminal Railroad has 455 miles of electrified road and 94 miles of steam road.

J. R. QUATTLEBAUM, a witness for the Interveners, testified:

I am Claim Agent for the Southern Railway at Spartanburg. I know the Duke Power Company building in Charlotte; within the past 24 hours I have been in that building and made a copy of the directory shown on the wall of the first floor, which is the Interveners' Exhibit 14. This directory shows that on the third floor of the building, the same floor where the offices of W. S. Lee are, and immediately following the name of J. S. Cureton, is the office of the Durham and Southern Railway; on the fourth floor, office of the Duke Endowment; on the third floor, office of G. G. Allen, whose name has been mentioned in the testimony; office of J. S. Cureton, referred to as Traffic Manager of the P. and N., and also the Durham and Southern; the list shows that the P. and N. has various offices in the same building; on the (290) third floor, traffic department; on the fourth floor, engineering department; on the third floor, accounting department of the P. and N.

JOS. G. KERR, a witness for the Interveners, testified:

I am Assistant to the Vice President of the Louisville and Nashville Railroad at Louisville, have been connected with the road in its general traffic department since 1903; started out as a stenographer; was chief rate clerk, assistant general freight agent, assistant to Vice President, which last position I have held for over seven years. From October, 1918, to March, 1920, was traffic assistant to the Director of Traffic in the United States Railroad Administration. In all of these positions, it has been necessary for me to know the practical operation of the L. and N. Railroad; I am daily engaged in fixing rates, the divisions of such rates, and many other matters, including the development of industries in industrial areas, making it necessary for me to know the location of industries, industrial side tracks, degrees of curvature permitted on such tracks, what kind of engines can operate over them, and what kind of engines are so operated, the general topography of the country, a broad knowledge of grades and curvatures, character of equipment, tonnage rating of locomotives; all of this knowledge is necessary in the proper fixation of freight rates and divisons. The Vice President, to whom I am assistant, is the Vice President in Charge of Traffic, all freight and passenger traffic on the system. I have been pretty much over the entire system; have been over every foot of our terminal (291) properties in every city of importance and to a large extent the terminals of other railroads with which we compete.

The map you show me, entitled "County Map of the Louisville and Nashville Railroad" is issued by its immigration or industrial department and is a geographically correct map of the L. and N.; its sole purpose is to show the location of its lines and not so much the location of other railroads. On the right hand side of the map in yellow I have shown the location of the Clinchfield Road south of Miller Yard to Spartanburg; the line now extends from Miller Yard to a connection with the C. and O. at Elkhorn City. I have shown by a blue line in connection between our Harlan County line near

Harlan, Kentucky, to our Cumberland Valley division at Hagans, Virginia, which will be opened up about December 1, 1930. I have shown by a broken blue line a connection between the so-called Eastern Kentucky Division, which extends from Richmond and Winchester on the West to McRoberts on the East, this proposed connection running from Ulvah to Chad, Kentucky. I have shown a broken blue line, a proposed railroad from Hagans on the Cumberland Valley Division to Speers Ferry on the Clinchfield. As to these proposed lines we are conditionally committed to build them by the Interstate Commerce Commission; in other words, it is a condition of the Clinchfield lease that we construct these connecting links; their exact location was not then fixed but we were required to build within twelve months after the certificate of convenience and necessity was granted; later we were temporarily relieved of construct-
(292) ing this part of the line from Hagans to Speers Ferry and from Ulvah to Chad, but we are committed to build both of these lines at the same time; if one is built the other must be. I have shown on the map in red the line of the Southern Railway from Knoxville through Morristown and Asheville to Spartanburg, and its line from Asheville to Marion where there is a connection with the Clinchfield. This map is the Interveners' Exhibit 5.

The general through merchandise routes via the L. and N. and the Clinchfield from the Ohio River and territory North and the Southeastern portion of the United States, which latter includes the Piedmont Section of the Carolinas, are as follows: By Ohio River crossings, I mean Cincinnati, Louisville, Evansville and the Mississippi River crossing at St. Louis and East St. Louis. We have merchandise routes from all of these crossings to the Piedmont Carolinas and the Carolinas generally via Jellico, Tennessee, and the Southern Railway and its connections. We have merchandise routes from Cincinnati via the L. and N. to Atlanta and the S. A. L. and Southern and other connections, beyond. We have routes from Louisville, Evansville, and St. Louis via the L. and N. to Nashville and then by the Nashville, Chattanooga and St. Louis, one of our subsidiaries, to Atlanta, Southern Railway and Seaboard, Central of Georgia and other connections beyond. We have good

merchandise routes from these Ohio River crossings at St. Louis via our lines to Birmingham, Montgomery and connections beyond, but these are limited largely to the (293) Southeast section and we do not ordinarily handle freight from that particular territory to the Piedmont Carolinas via Birmingham and Montgomery. We have a route, not a very satisfactory one, from the Ohio River crossings via our line to Norton, Virginia, the N. and W., the Clinchfield and connections beyond to the Piedmont Carolinas and other parts of the Carolinas. The principal route of the Clinchfield between these territories I have described is via the C. and O. to Elkhorn City, the Clinchfield to Spartanburg and connections beyond.

In 1924 the L. and N. and the A. C. L. by lease acquired the Clinchfield Lines. Since the lease was consummated we have been granted permission to build this line from Chevrolet, Kentucky, to Harlan, Virginia. Up to August 31, 1930, we have spent on that line, 13.87 miles, $4,647,000.00, and there remains to be expended an estimated amount of $752,753.00. We are not yet running trains over this line; it is expected to be in operation about December 1, 1930; we have published through rates on coal from the Harlan County field into the Piedmont Carolinas over this railroad, such rates to become effective December 1st; however, these rates at present are under suspension. We are conditionally committed to build these lines which I have described from Ulvah to Chad and from Hagans to Speers Ferry; the first line will be 18.13 miles long, and will cost $6,967,000; the other, which is an extension of the Chevrolet line, will be 36.26 miles long and will cost $10,396.00. The Commission relieved us of the necessity of constructing these additional connecting lines at this time so that we might test out the advisability of this new route by the con- (294) struction of this connecting link from Chad to Hagans, and the Commission indicated that we had used sound judgment in delaying for the present the expenditure of this money for these additional lines; as a part of building the Chad to Hagans connection, we have spent a good many thousand dollars in strengthening the line from Hagans to Norton, where we connect with the Interstate Railroad. We have also secured permis-

sion from the Commission to exercise trackage rights over the Interstate Railroad. In connection with the lease of the Clinchfield, the A. C. L. and the L. and N. jointly assumed obligations upon a sum considerably over Fifty-three Million Dollars. The L. and N. has two very large producing coal fields in Eastern Kentucky, the first on the McRoberts line which follows the Kentucky River; the second is in Bell and Harlan Counties in Southeastern Kentucky, which is on the upper Cumberland River. There is no movement of coal at all from this Eastern Kentucky field, served by the McRoberts line, to the Southeast and the Carolinas, because at present there is no practicable route over which it can be handled; however, there is a substantial movement of coal from the Harlan County field into the Carolinas, particularly the Piedmont; we carry that West to Corbin, southward to Knoxville, then via the Southern, and we carry it down to Atlanta and give it to the S. A. L. or other lines for movement into the Carolinas. The last time we made a careful estimate of the prospective movement via these proposed lines in 1925, was in connection with the building of these links. At that time the movement into the Carolina territory was 6,000 cars per (295) year. We count on moving ultimately and within a year or two, about 42,000 cars per year when our new connecting links are built and we are able to use the Clinchfield road and its connection into this territory. One of the purposes of the L. and N. in leasing the Clinchfield, if not its major purpose, was to open up this Harlan County, and also in Eastern Kentucky the McRoberts territory coal field, to this Carolina territory. Without that purpose the lease of the Clinchfield would not have been very advantageous to the L. and N. That was all prior to any knowledge on our part of any purpose or intention of the P. and N. to extend its lines to Winston-Salem.

We expect to get that coal from the Harlan County mining section into our yard at Loyal, near Harlan, and move it in our own trains vit the Chad-Hagans line, then over the present Cumberland Division to Norton; the Chad-Hagans line is shown on the map in blue; that is the line that will be opened up December 1st. We will then handle it in our own trains over tracks of the Interstate Railway to Millers Yard on the Clinchfield, and

the Clinchfield will handle it South through whatever junction may be necessary. The coal movement from the fields served by the L. and N. in Eastern Kentucky and Tennessee, the fields served by the Clinchfield to the P. and N. Railway stations is a very substantial amount at the present time. Both the L. and N. and the Clinchfield depend more largely on coal tonnage for traffic than any other kind of traffic. 58 per cent of the total tonnage handled by each is coal tonnage. Notwithstanding our present rather circuitous route, the L. and N. in 1929 originated for movement to the P. and N. (296) stations between Greenwood and Spartanburg, including Spartanburg and Anderson, 478 cars of coal, moved by the L. and N. to Atlanta and the S. A. L. to Greenwood, and the P. and N. beyond. To P. and N. stations between Gastonia and Charlotte, both inclusive, we originated in Harlan County field in 1929, 113 cars of coal which moved via the L. and N. to Atlanta, the S. A. L. to Pinoca and the P. and N. beyond. During the year 1929 the Clinchfield moved to points on the P. and N. in South Carolina, and delivered to that Company in Spartanburg 2,401 cars, 2,227 of which went to points on the P. and N. and 174 cars to points beyond the P. and N.; in other words, the P. and N. acted as an overhead carrier. During the same year the Clinchfield handled 131 cars of coal delivered to the Clinchfield by the C. and O., having origin on the C. and O. Of this, 119 were consigned to points on the P. and N. and 12 had destinations beyond the P. and N., that is, twelve cars were overhead. During the same year the Clinchfield handled 148 cars having origin on the N. and W., 138 destined to points on the P. and N. and 10 destined beyond. The same year the Clinchfield handled 724 cars of coal having origin on the Interstate Railroad, 608 of which were consigned to points on the P. and N., and 116 to points beyond the P. and N. Summing up during 1929, the Clinchfield transported 3,404 carloads of coal, which were delivered to the P. and N. at Spartanburg, 3,092 of which were destined to points served by the P. and N. and 312 cars moved over the P. and N. as an overhead line.

Of this coal, a total of 897 cars were consigned to the Duke Power Company and allied interests in South (297) Carolina; I am frank to admit I can not sepa-

rate the 897 cars as between what may be the Duke Power Interests, and, therefore, did not intend to refer to it. When I referred to the movement of 6,000 cars in 1925, and the estimate of 42,000 cars, I had reference to all of the Carolinas, but, of course, we had in mind particularly the Piedmont Section because of the very great industrial development in this territory and what is expected to take place in the future

In reference to the territory from and to which the P. and N. has obtained a haul in the transportation of merchandise during the year 1929, I will first deal with carload traffic, excepting coal delivered by the Clinchfield to the P. and N. at Spartanburg originating beyond the Clinchfield and destined to points beyond the P. and N., separating the traffic by origin and destination. As to figures for South Carolina, I have no separation as between stations in that State served by the P. and N. and those served by other lines, but as to figures for carload shipments to points in Alabama, Georgia and Florida, it is obvious they are not served by the P. and N.

There originated in Indiana a total of 97 cars, 17 of which were destined to Alabama, 32 to Georgia and 48 to South Carolina; in Illinois 30 cars destined to Georgia, 73 to South Carolina; in Kentucky, 9 cars consigned to Alabama, 14 to Georgia, 2 to Florida, 47 to South Carolina; there originated in Michigan 4 cars consigned to Alabama, 277 to Georgia, 74 to Florida, 199 to South Carolina; total 554; there originated in New York 4 cars consigned to Alabama, 3 to Georgia, 45 to South Caro-
(298) lina; total 52. There originated in Ohio 105 cars consigned to Alabama, 203 to Georgia, 8 to Florida, 329 to South Carolina; total 764. There originated in Pennsylvania 45 cars consigned to Alabama, 64 to Georgia, 2 to Florida and 53 to South Carolina; there originated in West Virginia 29 cars consigned to Alabama, 54 to Georgia, 3 to Florida; 13 to South Carolina; other miscellaneous states of origin, 21 cars consigned to Georgia, 190 to South Carolina. Omitting the cars consigned to South Carolina points, some of which at least must have been to points served by the P. and N. we find a total of 1,119 cars of freight other than coal originating in these Northern states which the Clinchfield delivered to the P. and N. at Spartanburg, and which the P. and

N. handled as an overhead carrier, that being pure overhead traffic.

Taking the traffic handled by the Clinchfield in the opposite direction, that is, received by the Clinchfield from the P. and N. at Spartanburg in 1929, 62 cars were consigned to Illinois, 2 of which originated in Florida, 8 of which were from Georgia, 48 from South Carolina on the P. and N. and 4 from South Carolina beyond the P. and N.; 18 cars were consigned to Indiana, 1 from Alabama, 1 from Florida, 15 from Georgia and 1 from South Carolina beyond the P. and N.; 38 cars were consigned to Kentucky, 1 from Alabama, 35 from Georgia, 1 from South Carolina on the P. and N. and 1 from South Carolina beyond the P. and N.; 96 cars were consigned to Michigan, 37 from Alabama, 2 from Florida, 36 from Georgia, 20 from South Carolina on the P. and N. and 1 from South Carolina beyond the P. and N. The cars from Alabama might be handled by a variety of routes (299) to Atlanta, but knowing how this traffic moves, I would say they would be handled by the S. A. L. from Birmingham and certainly from Atlanta, and thence on to Greenwood and over the P. and N. Going to Michigan, the direct route would be west of the mountains, but the P. and N. participates in a good deal of traffic where their through route is not the most direct one. You will note there is quite a movement from Indiana which would be every kind of traffic ordinarily handled by any standard railroad. Traffic from Southern Alabama to Michigan might be lumber; of course, there is a good deal of pipe.

In reference to circuitous routing, I call attention to the movement of 17 cars having origin in Indiana, consigned to points in Alabama. The direct route for this would be by the L. and N., or the Southern, and the circuitous line would be carrying it over here to give to the P. and N. to enjoy a haul and carrying it back to Alabama. That is undoubtedly some traffic that the P. and N. has been able to control for movement by its lines. A total of 20 cars had destination in New York, 16 from Georgia and 4 on the P. and N. in South Carolina; 928 carloads had destination in Ohio, 167 from Alabama, one from Florida, 644 from Georgia and 16 from P. and N. points in South Carolina; 55 cars to points in Pennsylvania, 5 from Alabama, 2 from

Florida, 45 from Georgia, 1 from P. and N. points in South Carolina, and 2 from South Carolina beyond the P. and N. 14 cars had destination in Virginia, one from Alabama, 12 from Georgia, 1 from South Carolina on the P. and N.; 49 cars were destined to West Virginia, 12 from Aalbama, 1 from Florida, 36 from Georgia; 34 cars were consigned to Canada, all from Georgia; 436 cars were consigned to (300) points on the Clinchfield, 55 from Alabama, 2 from Florida, 84 from points on the P. and N. in South Carolina, 7 from South Carolina beyond the P. and N.; 262 cars of this total of 436 originated west of the Mississippi in Arkansas, Oklahoma, Texas, Louisiana and Mississippi; most of that consisted of cotton consigned to mills on the Clinchfield in the general section of Marion. To all other miscellaneous destinations there were 75 cars, 17 from Alabama, 4 from Florida, 17 from Georgia, 36 from points on the P. and N. in South Carolina, and 1 from South Carolina beyond the P. and N.

I will now indicate the origin and destination territory for carload traffic other than coal received from and delivered to the P. and N. by the Clinchfield at Spartanburg during 1929, first giving the carload traffic destined to points on the P. and N. From Illinois, 359 cars, Indiana, 199 cars, Kentucky, 44 cars, Michigan, 1,016 cars, New York, 68 cars, Ohio, 705 cars, Pennsylvania, 118 cars, Virginia, 18 cars, West Virginia, 41 cars, Wisconsin, 154 cars; other miscellaneous states, 85 cars; Clinchfield Railroad stations, 159 cars; total, 2,966 cars. Received from the P. and N. and destination: Illinois, 52, Indiana, 1, Kentucky, 4, Michigan, 24, Ohio, 580, West Virginia 1, Wisconsin, 22, miscellaneous states, 5; Clinchfield Railroad stations, 5; total, 694. None of these figures include the bridge traffic which I have heretofore given. The Clinchfield also participated in movement of considerable carload and less than carload freight originating on and destined to points on the P. and N. in North Carolina during 1929, consigned to these P. and (301) N. stations in North Carolina; Coal, 758 cars; miscellaneous, 2,966 cars; L. C. L., 4,009,985 pounds. From P. and N. railway stations in North Carolina: Miscellaneous cars, 694; L. C. L. freight, 1,107,378 pounds.

Correcting my testimony heretofore given, when I

referred to Spartanburg, I should have stated that this total of 2,966 cars to, and 694 cars from, were to and from points on the P. and N. in North Carolina. I had previously given the figures for South Carolina at Spartanburg. I do not believe I have given the interchange between the Clinchfield and the P. and N. at Spartanburg in respect to L. C. L. freight during 1929. The Clinchfield received from the P. and N. 2,383,999 pounds and delivered to it, 4,023,968 pounds. The Clinchfield participated during the same year in the movement of 1,107,378 pounds of L. C. L. originating at points on the P. and N. North Carolina line, and also 4,099,985 pounds destined to points on the P. and N. in North Carolina; all of these figures cover the year 1929.

With particular respect to the overhead traffic, we believe that upon the construction of the P. and N. to Winston-Salem, the great bulk of that traffic will be absolutely lost to the Clinchfield, and we also believe the considerable traffic now moving via other routes of our company will be lost to this new trunk line or route serving the northern and eastern territory on the one hand and the Piedmont Carolinas and the Southeastern Sections on the other. In respect of coal, we also feel that a considerable part of that coal that we are now moving, and that which we expect to move by our new connecting link will be lost to this new trunk line operating through Winston-Salem in connection with the Norfolk and Western.

(302) Exhibit 5 of the Commission, which is the response of the defendant to the questionnaire submitted by the Commission in Finance Docket 6208, states that it is estimated that 21 per cent of the freight traffic will have origin and destination on applicant's line; approximately 44 per cent will originate beyond and be destined to applicant's stations. Approximately 20 per cent will originate on applicant's lines and be destined to points in other territories. Approximately 15 per cent will be from and destined beyond applicant's lines. In reference to the Louisville and Nashville, in 1929, 86 per cent of its total tonnage originated on its own railroad, which corresponds with figures that have existed over quite a few years. 14 per cent of their total tonnage was received from connecting lines; of the traffic which we originated we terminated 32 per cent, that is to say 32

per cent of our total tonnage terminated on our line and also had origin on it. We delivered to connections 54 per cent of the total traffic, that is 54 per cent of the total traffic which had origin on the line. 5 per cent of our total tonnage, or at least that part included in the 14 per cent, terminated on the line and 9 per cent was delivered to connectons; in other words, our bridge traffic represented 5 per cent of our total traffic; of course, the revenue would be slightly larger because overhead traffice consists more largely of hign class merchandise which pays a good deal better revenue than average traffic. In respect to the Clinchfield for 1929, 57 per cent of its traffic originated on its line and 43 per cent was received from connections. Separating these figures there (303) originated and terminated on the Clinchfield 10 per cent; originated on the Clinchfield and delivered to connections 47 per cent; received from connections and terminated on the Clinchfield, 13 per cent; received from connections and delivered to connections, 30 per cent; in other words, 30 per cent of its tonnage was overhead or bridge traffic.

Exhibit 5, Supplemental Return to the Questionnaire, is a statement signed by its Vice President, Mr. Thomason, which states that the maximum rate of curvature is from 8 to 10 degrees between cities and as high as from 20 to 25 degrees and more approaching and in cities. Without giving a complete list where the L and N. operates through streets, because we operate through city streets in many places, some of these streets are not open as ordinary streets; in other words, they are closed and I am excluding those in making this statement. Our main line operates through city streets open to all kinds of traffic, for instance, at Newport, Kentucky, we operate through the middle of Saratoga Street. We operate through several squares of streets in Lexington, Kentucky. The street at Newport is an improved street; we operate through streets in Frankfort, Kentucky, also LaGrange; also, Louisville, through a street which is paved on each side of the track, although I don't believe it is paved between the track. There is a double track railorad through this street and it is a very fine residential section for about six or seven city blocks. We operate through the center of a street in Pensacola, Florida, which is an improved street, for a distance of

six or eight blocks; also through a city street in Brew-
(304) ton, Alabama, through one of the best streets in the town. We operate through the center of Commerce Street in Mobile, Alabama, in the heart of the wholesale district; in fact it is the wholesale district; the track runs through this street for a number of squares. Also, the Mobile and Ohio Railway has a track alongside of ours on this street. We also operate on Water Street in Evansville, Indiana. We have industrial tracks in parts of city streets in almost every city in which we operate; I mean, tracks leading to team tracks or industries.

The L. and N. and the Southern Railway place cars on the track on Commerce Street in Mobile above referred to, and that track is used not only for our main line trains, but for switching cars for industrial purposes.

In reference to degree of curvature of tracks, I have personal knowledge of the situations I now am discussing; I will not go over our entire system. We have five industry tracks at Evansville, Indiana, where the curves are 30 degrees, one of them being a 45-degree curve. These tracks are switched constantly, without any trouble, by our Class B-4 and Class B-5 engines, which are short wheel base switching engines, with six wheels and without pony trucks. We have quite a number of these small switch engines over the system; in fact, practically every terminal of any importance has one or more in connection with the switching to industries where the curvature is sharp; the policy of our company now is to construct industrial side tracks where it can not be avoided up to 30 degrees curvature. At Louisville we have six industries in one district, all of which have side tracks with curvature as high as 30 de-
(305) grees, and these are regularly switched with three different engines assigned to that particular service. At Mobile we have an industrial track with 39-degree curvature regularly switched by one of our switcher engines which I have been discussing; we have another track of 10-15 degrees, one of 30, 25, 20, 23 and one of 10 degrees in Mobile.

With reference to curvature of main line, we have a line from Etowah, Tennessee, to Marietta where we have numerous 14, 15 and 16 degree curves on the main line

and many of these curves are at points where the grade is exceedingly heavy; for instance, two 16-degree curves within one mile on a one and a half per cent grade. We do not use that particular line in handling our through traffic, although there is a very heavy traffic on it. We use that line to deliver merchandise to the cities and inhabitants along the line. This line connects with the Southern Railway at Murphy. We operate over this line without difficulty, but I do not mean to say that we can go around these heavy curves and these heavy grades at full speed. On our Birmingham Division, we have literally dozens of 10-degree curves and quite a few up to 14 degrees. On our Nashville, Florence and Sheffield division we have numerous 10 and 12-degree curves, one as high as 14, one 15 and one of 18 degrees. I think we operate over some of the tracks of the short electric line in that district; we ourselves operate our passenger service over this particular division by means of a gas electric car from Columbia to Sheffield, about the same type of car that the P. and N. handles its passenger traffic with between Spartanburg and Greenville. (306) We operate this gasoline electric car over approximately 87 miles. It is operated by an electric motor, the electricity being generated or produced by a gas engine. Most railroads have this class of car; I have seen them on quite a good many railroads; it is what we call a combination passenger car; its seating capacity is 61; I think the seating capacity of the P. and N. is 58 or 59. Our company's cars are equipped to handle a trailer or extra car in the same manner as the P. and N. passenger car.

On our Lexington branch, east of Frankfort, Kentucky, we have 14-degree curves on grades of .98, .35 and 1.16 per cent, and operate with heavy power over them. On our Prattville branch in Alabama, on what is considered a main or branch track, not an industrial track, we have a curve of 20 degrees. On our Eastern Kentucky Division we have numerous 10-degree curves, on the main line of which we handle very heavy coal trains and the heaviest power we have. All of our power arrangements are designed to take 19-degree curves. I don't think we have an engine not designed to readily move over a 19-degree curve. In a number of branches connecting with the Eastern Kentucky division, we have

numerous 10-degree and some as high as 12-degree and 13-degree curves. On the Harland County line there are also numerous 10-degree curves on the main line, particularly on the last line which we constructed, and have numerous branches connecting with this particular coal division with curves of 10, 14 and some 16 degrees, some on exceedingly heavy grades, by which I mean in the neighborhood of 3 per cent, and over these we regularly switch with our heavy type engine.

CROSS EXAMINATION.

(307) The rate on coal from the Norfolk and Western mines through Winston-Salem to Mt. Holly is $3.07 per ton; immediately South of Mt. Holly to poitns in North and South Carolina, it is $3.15 per ton. This rate applies to Mt. Holly via Winston-Salem, Southern Railway, Charlotte and P. and N.; it also applies via Norfolk and Western to Durham, and I assume this is through the Durham and Southern and Apex. The higher rate south of Mt. Holly does not apply via Winston-Salem, but only via the Durham line. That is the information I have, but I have not the tariff before me. The present rate on coal from the L. and N. lines to Mt. Holly is $3.10 per ton, but I would not say that it applied through Spartanburg; am not certain about it. The only information I have as to that rate is that that rate applies only via Atlanta, S. A. L. to Pinoca and P. and N. beyond. There is another group of mines, the so-called Benton group, from which the present rate is $3.21. We have a rate of $2.87 from Spartanburg to Mt. Holly to become effective December 1, 1930, with the opening of the new line. We hope this rate will become effecfive December 1st. The Southern Railway, among others, is opposing this new rate. In 1925 the L. and N. moved 6,000 cars of coal into the entire Carolina Section, but particularly in the Piedmont Carolinas Section, and we anticipate that this traffic will be increased to 42,000 cars. Very little of this goes to Charleston and Savannah for steamship purposes. This would make an increase of 36,000 cars. I don't know from what railroads these 36,000 cars will be taken. They will not be entirely diverted from other railroads, but certainly a (308) large part will be. They will largely be taken from the Virginian and the West Virginian fields and

from the Norfolk and Western, C. and O. and the Virginian Railway in my opinion, but at a substantial reduction in freight rates. It is very doubtful that it will take any from the Southern, as we propose to put in from that field exactly the same freight rate that the Southern operates from the same general field. There might be some shift in the trend of the traffic. If the P. and N. is not constructed to Winston-Salem, this new rate will materially benefit the Seaboard and P. and N. route, but with the building of the line northward to the coal field, because of other factors, we contemplate a very serious loss of coal tonnage.

If the P. and N. is not built to Winston-Salem but only from Spartanburg to Gastonia, it is rather hard for me to say whether it will benefit rather than hurt the Clinchfield. If it turned all the business over to the Winston-Salem Southbound and the Norfolk-Southern to Charlotte, it would be just the same as building another line, so far as loss to the Southern is concerned. I know positively it is not freight rate alone that controls the sale of coal; no matter what field in which a mine is located, it must lay down the coal at destinations at a price equivalent to what coal can be laid down by its competitors; where the quality of the coal and the purpose is the same, it is not the freight rate alone that controls this movement. There is a limit beyond which the mine can not shrink; our mines up there are today shrinking in price 20 to 23 cents per ton to meet the competition in Southwest Virginia.

The only disagreement between L. and N. and the Southern is as to the matter of the level of rates and the (309) Interstate Commerce Commission is the only one that can decide that question. It is just a minor difference of opinion.

The Atlantic Coast Line owns slightly more than 51 per cent of the stock of the L. and N.; the two are parts of the same system through this stock ownership. They maintain separate organizations. Henry Walters is Chairman of the Board of the L. and N. and also Chairman of the Board of the A. C. L. His office is in New York. The general offices of the L. and N. are at Louisville, and of the A. C. L. at Wilmington. The Charleston and Western Carolina is recognized as the Coast Line's property. I don't think there is any doubt that

as a matter of fact it is controlled by the Coast Line. The holder of the stock of the L. and N. is the New York Trust Company, Trustee for the A. C. L. Railroad Company.

The Clinchfield turned over to the C. and W. C. at Spartanburg in 1929, 12,766 carloads of coal. I meant to say that if the P. and N. built only from Spartanburg to Gastonia and not from Charlotte to Winston-Salem, and if it was able to use the route to Winston-Salem over the Southbound, that the effect would be the same as to most of the traffic to the Clinchfield, Louisville and Nashville; I did not mean to say to the Southern Railway.

**DEFENDANT'S EVIDENCE.**

Defendant offered in evidence as its Exhibit A, photograph, identified by witness Hungerford, of a passenger car or passenger train of the P. and N. Railway. The witness testified that the photograph was a correct representation of a passenger car of the P. and N. Rail-
(310) way. Beneath the photograph of the car shown on the exhibit is the following: "Piedmont and Northern Railway Passenger Train, South Street, Gastonia, N. C." The photograph shows an electric passenger car on a street in the business section of the town; it shows the trolley and the trolley wires. The photograph shows on the car "Piedmont and Northern, No. 2101".

Defendant introduced in evidence as its Exhibit B, photograph identified by the witness Hungerford, who testified that it was a photograph of a Southern Passenger train. The photograph is marked "Southern Ry., Crescent Limited, Ten Cars, Charlotte, N. C., October 16, 1930". It shows a train composed of an engine and ten cars, which is being operated over a double track line.

Defendant introduced in evidence as its Exhibit C, photograph identified by the witness Hungerford, which is a photograph of a freight train with an engine and beneath the photograph is the following: "Southern Ry. Freight Train, 57 cars, arriving Charlotte, N. C. 4:30 P. M., October 15, 1930."

Defendant offered in evidence as its Exhibit D, pho-

tograph of a P. and N. freight train operating down Franklin Avenue in Gastonia, identified by witness Hungerford. The photograph shows an electric engine with box cars attached on a track in a city street; shows the trolley and trolley wire; beneath the photograph occurs the following: "Piedmont and Northern Freight Train No. 5502, September 29, 1930, 12 loads." On the engine in the photograph appears the Number "5502" and "Piedmont and Northern".

Defendant offered in evidence as its Exhibit E, contract between the Southern Railway and the Norfolk-
(311) Southern Railway, copy of which was produced by the Southern Railway in response to defendant's notice. The date of the contract is May 20, 1920. The contract states that immediate steps will be taken to make applicable via Charlotte, thence Norfolk-Southern to Norfolk, all tariffs published by the Southern Railway or its agents, on traffic moving to and from Eastern cities, interior Eastern points, including Buffalo and Pittsburgh territory; also applying to the following Virginian cities: Norfolk, Suffolk, Portsmouth and Pinners Point; all tariffs published by the Southern Railway or its agents applicable to traffic moving to and from Durham, North Carolina, and other stations on the Durham and South Carolina Railroad, which latter road has been absorbed and will be operated by the Norfolk-Southern; Southern Railway System percentage, issued 1917, to be revised and amplified so as to apply to both North and Southbound; to include Suffolk; to include Durham and other stations on the Durham and South Carolina line. The agreement further states: "This agreement is undertaken for the mutual benefit of the Southern Railway and the Norfolk-Southern Railroad. It is understood that the Norfolk-Southern Railroad will, as far as it properly may, treat the Southern Railway as its preferred connection; also that it will, as far as it properly may, consider the Chesapeake Steamship Company as a part of the Southern Railway System and its preferred connection on traffic moving to, from and via Baltimore. The Southern Railway will in turn open the Charlotte route freely to the traffic and solicitation of the Norfolk-Southern to and from all points and ter-
(312) ritories included in the memorandum pertaining to percentages and division herewith attached." The

Southern will freely interchange its equipment with the Norfolk-Southern at Charlotte and other junction points forming through routes, and will participate with that line in through package car service.

Defendant offered in evidence as its Exhibit F, agreement between the Southern Railway and the Georgia and Florida Railway, dated December 18, 1926, copy of which was produced by the Southern Railway in response to defendant's notice. The contract covers the use by the Georgia and Florida of a bridge which the Southern Railway has over the Savannah River, and certain trackage rights. The Ninth paragraph of this contract provides: "That as a principal consideration moving the Southern Company to make and enter into this agreement and to grant to the Georgia Company the rights and privileges herein granted to it, without which this agreement would not have been made, or the said privileges would not have been granted by the Southern Company, the Georgia Company agrees hereby to make the railroad of the Southern Company and/or any other railroad in what is known as the Southern Railway System, the preferred connection of the Georgia Company with respect to all freight traffic moving over the railroad of the Georgia Company, the routing of which may not be otherwise designated or specified to the Georgia Company or its connections by the shipper thereof."

Defendant offered in evidence as its Exhibit G, contract dated August 23, 1908, between Southern Railway and the Ware Shoals Railroad Company, copy of which was produced by the Southern Railway in response to the notice of the defendant; this covers the traffic out (313) from Shoals Junction to the cotton mills at Ware Shoals. The contract recites that the railroad belongs to the Southern and is leased by it to the Ware Shoals Company for operation. Paragraph Sixth provides "that during the life of this agreement the Shoals Company will make the Southern Company at said Shoals Junction its exclusive connection for all of its traffic."

CROSS EXAMINATION OF JOSEPH G. KERR.

I stated that the A. C. L. owns 51 per cent of the stock of the L. and N. and that the A. C. L. and the L.

and N. together are lessors of the Clinchfield, 50 per cent each. My understanding is that the A. C. L. controls the C. and W. C., and the latter is known to traffic men as a part of the system of the A. C. L. My impression is that the Columbia, Newberry and Laurens Railroad is a part of the Coast Line itself. The Atlantic, Birmingham and Coast, known as the A. B. and C., is at least owned by the same people as own the Coast Line System. The Atlantic Coast Line has an interest in the Western of Alabama and also the Atlanta and West Point. The Georgia Railroad is leased jointly by the L. and N. and the A. C. L.; the Winston-Salem Southbound is owned 50 per cent each by the A. C. L. and the N. and W. The L. and N. owns about 72 per cent of the stock of the Nashville, Chattanooga and St. Louis. The A. C. L. owns an interest in the Richmond, Fredericksburg and Potomac Line operating between Richmond and Washington, but I don't know exactly what this interest is.

ALBERT S. RICHEY, a witness on behalf of the defendant, testified:

I live at Worcester, Massachusetts; was graduated from Purdue University in 1894 and entered the street railway business, electric railway business, directly after that, was with the Citizens Street Railway Company at Muncie, Indiana, and other constituent companies that later made up the Union Traction Company, as electrician, chief electrician, electrical engineer and later chief engineer of the Union Traction Company, until October, 1905, when I went to Worcester, Massachusetts, as Pro-
(314) fessor of Electric Railroad Engineering at Worcester Polytechnic Institute, which place I have occupied ever since and still hold as a part time professor. Since 1905 I have been a consulting engineer, principally with electric railways. As to the Union Traction Company, which was first organized about 1896, about 1900 the Union Traction Company of Indiana was formed, which included the Union Traction Company, the Citizens Street Railway Company of Muncie, the Marion Street Railway at Marion, Indiana, and the Ellwood Street Railway. I am familiar with the development of electric railways in the United States prior to 1920.

The first successfully operated electric railway in this country was in Richmond, Virginia, in 1888. That was a street railway. It had a surprising number of the same characteristics as the present street railway, that is, it was operated from an overhead trolley with an underrunning trolley wheel and a trolley pole, practically the same as the present street railways.

The motors were along the same order as the present motors. Of course, there have been developments in the art, but they were hung on the axles in about the same way. The current was led to the car through overhead trolley and back to the power station through rails and a surprising number of features that have been retained right straight through by the eletric railways until today.

Following the Richmond development in 1888, the electric street railways grew very rapidly, a very large number of former horse car and cable car lines were converted to the use of electricity, so that by the time I was half-way through college in 1892 or 1893, electric street (315) railway lines were quite common over the country.

Shortly after the development of the street railway, these companies began to extend their lines out into the suburbs of cities, in what is known as suburban lines, by the latter part of the 90's, that is 1896, 1897 and 1898; still further extensions were made in connecting cities and towns with what was commonly known, and has been known as the interurban railway. Those liens were built first along the highways in about the same way as the city lines and the suburban lines had been built. By 1897 and 1898 one or to roads in the Middle States began construction on private right-of-way, with track, construction, weight of rail, roadbed, details very similar to the steam railroad construction which was common in that territory at that time, first usually with 56 or 60 pound rails. By 1900 I know of several roads using 70-pound rail, and by 1902 or 1903 several hundred miles of construction with 80-pound rail.

Q. Were these roads with the 80-pound rail which you knew about by 1902 or 1903 commonly known and designated in the electrical industry as interurban electric railways?

ALBERT S. RICHEY.

(Counsel for the plaintiffs objected to this question on the ground that while it was perfectly competent for this witness or any other witness who knows to give the physical characteristics and the operation and other fact data as to any railroad which he wishes to compare with the Piedmont and Northern, it was incompetent for such witness to undertake to say whether or not such a railroad was at any time an interurban electric railway, since that would be for the witness to express an opinion on the ultimate question of law to be decided by the (316) court in this case; that is, the meaning of the term "Interurban electric railway" as used in Section 1, paragraphs 18 to 22, of the statute.)

After argument, the Court said:

The COURT: He (the witness) can talk about that (electric railways) all he wants so far as it deals with equipment, and so long as it deals with method of operation and things of that kind, but the only place he can not talk about them is when he attempts to say that in his opinion this railroad (Piedmont and Northern) or some other one comes within the meaning of the keyword to this whole suit, namely, "interurban electric railway".

COUNSEL FOR DEFENDANT: May it please your Honor, I am simply showing by this witness now, and I have not asked him for any opinion at all, but I have asked him if certain railroads to which he has referred as to having private rights of way, and I think * * *.

The COURT: * * * were at that time commonly denominated as interurbans in the electric railway industry.

COUNSEL FOR DEFENDANT: Yes, sir. How am I going to examine this witness about electric railways and how will I examine any other witness about electric railways unless we talk about the different kinds of electric railways, as those electric railways were known prior to the passage of the Act of Congress? How are we going to try a case about an interurban electric railway, and whether the Piedmont and Northern is an interurban electric railway, if the word "interurban" is to be taboo?

The COURT: I still adhere to it, that you cannot ask him whether or not a certain railroad was at that time an interurban electric railway.

COUNSEL FOR DEFENDANT: I am not going to ask him whether any certain railroad was an interurban electric (317) railroad. I am not going into collateral issues with him and try out the character of different railroads. These gentlemen would say that the sole test is not the three which Judge Soper gave, construction, equipment and business, but whether it competes with another railroad.

The COURT: I have added a fourth to it, and that is history.

COUNSEL FOR DEFENDANT: And that is really what we want.

The COURT: I am going to exclude that particular question right now.

COUNSEL FOR DEFENDANT: Will your Honor allow us an exception?

The COURT: Yes, sir. As I recall it, it was whether certain particular railroads in the middle west were generally considered to be interurban electric railways.

COUNSEL FOR DEFENDANT: No, sir, that was not the question that I intended to ask.

The COURT: Then what was it?

(The reporter thereupon repeated the last question as follows: "Q. The question is were these roads with the 80-pound rail which you knew about in 1902 and 1903 commonly known and designated in the electric railway industry as interurban electric railroads?")

The COURT: That is the question you gentlemen objected to?

COUNSEL FOR PLAINTIFFS: Yes, sir.

The COURT: I am going to sustain your objection to that question, he can state the characteristics of those roads, but he cannot express either what he thought or what the general public thought with reference to them (318) being interurban railroads.

COUNSEL FOR DEFENDANT: Under the Equity rule, may it please your honor, we must put into the record what we propose to prove. Will your Honor permit the witness to make a statement?

The COURT: Yes, he may make a statement as to what his answer would be.

COUNSEL FOR DEFENDANT: Will you answer the question?

The COURT: But it will be excluded.

A. They were.

To the sustaining of plaintiffs' objection and the exclusion of said question and answer defendant duly excepted, which is its First Exception.

Examination by Counsel for Defendant, continued:

Q. Will you please continue with your statement as to the development of electric railways prior to 1920? You have gotten down to the extension between towns. A. I think I omitted to mention the development in connection with the city lines of the rapid transit lines such as subway and elevated systems. The development of the interurban during the period from 1900 to 1910 or 1915 was quite rapid.

The development was probably the greatest in the middle states, Indiana, Illinois, Michigan and Ohio. Indianapolis, which is quite a railroad center, has about the same number of interurban roads entering it as steam railroads.

COUNSEL FOR PLAINTIFFS: We object to that on the same ground, if your honor please, and move to strike (319) it out.

The COURT: He has got to testify to what happened out there.

COUNSEL FOR PLAINTIFFS: Here is the point exactly as I see it. There is no wide difference between us as to what is the law of competency of evidence. Of course, counsel put his construction upon the Winans case (*Winans* vs. *New York & Erie Railroad Company*, 21 Howard (U. S.), page 88), and I put mine, and it holds that technical terms of art may be testified to by an expert witness, that is, by opinion evidence. Here is the point as I see it exactly. What is the art about which we are talking. The art is electric railroads. The art is elec-

tricity. This witness can testify about electrical railroads, about voltage, about amperes, about whatever other technical terms arise in that art, but the question of whether any particular railroad is interurban or not is not a part of the electric science, is not covered by electrical science and it is not a technical term of the art, and there is no art of which the word "Interurban" is a part.

The COURT: They were roads which he at that time and which were commonly called interurban. How will he describe them? He can say that they were electric railroads operating between cities and that is about the only language he can use.

COUNSEL FOR PLAINTIFFS: We do not want to be in the position of backing away from our former objection. We cannot object every time a witness will mention the word "interurban".

The COURT: Yes, Professor, when you use the word "interurban" use it as operating between cities or towns.

COUNSEL FOR DEFENDANT: If your Honor please, do I understand that the witness is instructed not to use (320) the word "interurban" but to use "between cities" and that I am instructed to do that?

The COURT: No, sir, I do not rule that way at all. Go ahead with your examination and I will not strike that use of it out, because I know what he means and I think everybody else does. He is not attempting to control the court.

COUNSEL FOR PLAINTIFFS: We were trying to be consistent with our objection.

A. (Continued.) I started to say that in Indianapolis there was an interurban station, the Union Station, built of quite considerable size to furnish terminal facilities for these different lines of this sort that entered Indianapolis. Similar stations were built in a number of other cities in that territory, such as Dayton, Detroit and others, to care for the passenger business of these lines. From the start, these lines did a constantly increasing amount of freight business.

COUNSEL FOR DEFENDANTS

Q. You say these lines; what lines do you mean?
A. I mean the interurban lines that I have been talking

about. At first that freight business was nearer express business. It was handled as parcel freight in box cars with electric motors. As that business grew, attempts were made to handle carload freight, the first lines getting into trouble because the special work in the track of these lines on city streets would not give enough flange way to take the standard M. C. B. flanges.

By 1901 and 1902, most of these interurban lines were so constructing their special work that the city lines over which the interurban operated were changing (321) their special work so as to accommodate their standard M. C. B. flange and thread of the wheels used by the steam railroads, so that they would interchange traffic with steam railroads.

That traffic interchange began well before 1910 on some of those roads. By 1917 it had reached a considerable portion of the total amount of revenue obtained by some of the interurban roads in the Middle States.

To a certain extent I have made a study of the financial phase, as well as the physical, in connection with the rate cases.

By COUNSEL FOR DEFENDANT:

Q. Go ahead, Professor, please. You were speaking of these interurban electrics getting into freight business and interchanging with the connecting lines. A. Yes.

Beginning about 1913, 1915 or 1917 the automobile was beginning to make itself very seriously felt in the passenger business of the interurbans. The numbers of automobiles were constantly increasing and good roads were coming on and from then on up until now they have constantly taken passenger travel away from the interurban railway.

A good many of them have been forced to go out of business because of the disappearance of so much of their passenger business. Others, where they could, have turned an increasing amount of attention to the freight business in an effort to keep above water by substituting freight for the passenger business, which most of them I think had primarily in mind when their roads were originally built, although some of these roads

—and you said to keep back of 1920—some of these roads back of 1920 were built with the idea of doing a large (322) amount of freight business from the start.

But others that had not been doing that turned their attention more and more to the freight business, taking all the freight business that they could get and that they could handle and making every effort to get it to recoup the losses from their passenger business.

Prior to 1920 some of these electric railroads, which I have referred to as interurbans, engaged in the general transportation of freight; the road that I was directly connected with at that time did a small amount of freight business in 1898. These roads did not handle carloads of freight as early as that, but I know of freight handled in carload lots and in trains as early as 1904 and 1905.

Q. And from then on until 1920, what was the tendency of these electric roads to which you have referred as interurbans to expand and increase their business of the general transportation of freight and its handling in carload lots in trains? A. The general tendency was to increase the freight business as much as possible and as rapidly as possible.

Q. Prior to 1920, did these electric railways to which you have referred as interurbans interchange freight cars with connecting steam railroads? A. A good many of them, yes.

Q. Did they participate with connecting steam railroads in through freight routes? A, Yes.

(323) Q. What do you know about the competition about these electric railroads to which you have referred as interurbans and steam railroads prior to 1920, competition for both freight and passenger? A. In the very early days there was a distance competition between the two classes of roads for passenger business, and at least through Indiana, and in most of that country, that section of the country, the interurban lines were built directly adjacent to the steam railroads' right-of-way. I think the Union Traction Company, in its nearly 300 miles of track in 1905, had more than two-thirds of its right-of-way immediately adjacent to and paralleling steam railroads, the Big Four and the Pennsylvania lines West of Pittsburgh, the Lake Erie & Western, and the

Monon Railroad. These steam railroads felt the competition on passenger business very keenly, and most of them very considerably reduced their local passenger service because the interurban roads took that local passenger business away from them, gave more frequent and more convenient service, and landed their passengers closer to where they wanted to go in the towns and cities along the line, and, as I say, most of these steam railroads very considerably reduced the amount of local passenger service that they were doing. Now, of course, there was the same sort of competition in freight and express business. I might say that most of these interurban roads in that section of the country had contracts with the express companies, which is now the Railway Express Agency, to handle the small package express matter on their lines.

This competition between the electric roads, known as interurbans, and steam railroads for freight traffic (324) up until about 1920 increased in amount to the extent that the electric lines were reaching out for that business more and more. Prior to 1920 and in the early part of 1920, the official magazine of the American Electric Railway Association had quite a series of articles urging the interurban lines to go into that business, pointing out the advantages of handling freight in carload lots in an interchange with steam railroads.

Q. Now, prior to 1920 did these electric railroads to which you have referred as interurbans have physical connections with steam railroads? A. Oh, yes.

Q. Did those interurban electrics prior to 1920 engage in the handling of interstate freight as well as local freight? A. Yes.

They were located practically altogether on private rights-of-way. They operated through streets generally in going through the towns and cities and usually used the street railway tracks in those cities where there were street railway tracks. I was quite familiar with the Union Traction construction, and it was comparable to the others in that section of the country. A portion of its lines built in 1901 and 1902 were built on private rights-of-way with a minimum width of 49½ feet and wider where necessary for cuts and fills; the maximum

grade was 1 per cent, except in special instances where that had to be exceeded; it was attempted to keep the curvature down to 3 degrees but there were places where that had to be exceeded, especially on right angled corners and city streets where, of course, the curves were very much sharper.

In electrical railway work, I don't know what the (325) steam railroad men would say, but in our classification, when we get down to a radius curve, such as that, we quit talking about degrees and talk about the foot radius of the curve, and the radius of a curve on a right-angled corner in a city street depends on the width of the street, of course, sometimes as short as 45-foot or 50-foot radius curve. Now, almost exactly the constant 5,730 divided by the degree of curvature will give the radius of the curve in feet. The degree of curvature is the arc which is subtended by a 100 foot cord, but when you get down to a 50-foot radius curve you are subtending the whole circle of the 50-foot cord, and you can not express it in degrees, so generally a curve as sharp as a 200 or 250-foot radius in the electrical railway business is spoken of by the radius of the curve instead of degree.

When you come to a 45-foot radius curve you can not express it in degrees, because a 100-foot cord would more than span the whole circle, if it went all the way around in a circle. It is not possible on as sharp a curve as that.

The Union Traction Company was typical of those interurban roads that were built about the same time, or prior to 1920, in Indiana, Ohio, Illinois and Michigan and many other parts of the country. I am not so familiar with the interurban roads on the Pacific Coast and in Utah, except from reading descriptions and seeing photographs of them. I have never had much work in connection with roads west of the Mississippi River.

COUNSEL FOR PLAINTIFFS: If your Honor please, to maintain the consistency of our position, we have not wanted to interrupt the witness' relation of the history of these roads, some portions of which are competent, (326) it being our view that it is perfectly competent for him to give the history and development of these electric railways. We can not object every time he char-

acterizes one or more of them as interurban. At this point, in answer to the last question he did undertake to characterize the Union Traction, as I understood it, as being typical of a group which he characterized as being interurban electric railways. We want to make the point, and make this objection in that form, so that your Honor can understand that we do throughout object to the use of interurban as characterizing any individual or any group of railroads.

The COURT: Well, the Court rules this way, that if this witness would attempt to say that certain railroads were interurban within the meaning of this Act, he would exclude it, but that it is impossible for him to talk about the development of these railways, electric railways from along about 1880 something up to 1920, without using a term which was commonly used, and the Court understands that it is not used in the legal sense when it is used. Now, that is the Court's view of the matter. I think it is the only reasonable and sensible view in the matter that this Court can take of it.

COUNSEL FOR PLAINTIFFS: That is true.

COUNSEL FOR DEFENDANT: I hate to have use the word "railroads running between one or two or more towns" every time * * *

The COURT: I will not put any such necessity on him.

By COUNSEL FOR DEFENDANT:

Q. Now, Professor Richey, tell us something about mileage, how long these interurban electrics were prior to 1920, or some of them. A. In reference to the length of these interurban electric railways prior to 1920, the (327) Union Traction Company, when I was with it in 1905, operated 365 miles of track, not more than 60 miles of which were city lines. The Illinois Traction Company, as it was then known, operated considerably more than 300 miles of track; the Detroit United Railway, outside of its city lines in Detroit, operated some 200 or 300 miles of interurban; it sold its city lines to the City of Detroit in 1920 or 1921, and its interurban lines were later reorganized, and I think are now known as the Eastern Michigan Electric Railway. The Indianapolis and Eastern had some 200 miles of track, and the Fort Wayne and Wabash Valley had something like 200 miles. There were others that had not more than 20 miles; there were

considerably more than 1,000 miles of interurban track in Indiana between 1905 and 1910.

The Illinois Traction Company at that time was an entirely different thing from what it is today; today it is a holding company which owns, among other things, the Illinois Power Company and Light Corporation, the Illinois Terminal Railway System, which latter has an electrified division which was what I knew fifteen years ago as the Illinois Traction Company. The Illinois Traction Company was built as electric wholly. The electric division of the Illinois Terminal Company was, prior to 1920, the Illinois Traction Company and was an interurban electric railroad.

These interurban electric railroads I have referred to maintain freight stations in the larger towns and cities through which they operate, for instance, in Indianapolis several interurban roads maintained a consolidated freight station and yards not far from the center of the city, within a few blocks from Union Interurban Station, which was a passenger station. That was generally done when several of these roads came into the same city, as well as the freight stations along their individual lines.

I made an inspection of the lines of the P. and N., including all of the main line, which I have been over (328) personally; examined its shops at Pinoca and Greenville and examined its construction. I found the road operated by 1500-volt direct current supplied through an overhead trolley, mostly suspended on catenary construction from brackets attached to wood poles. That overhead construction is similar to that of the roads about which I have testified, with the exception of the use of 1500 volts and catenary construction, both of which have been developments in the art since the building of these earlier interurban roads about which I have testified. I mean the roads which were constructed along in 1901 and 1902. In 1907 the Indianapolis and Louisville Traction Company was constructed with 1200-volt direct current and catenary construction, and that, as far as I know, was the first 1200-volt road. Between that time and 1912 when this road was built, it was found further desirable and possible to raise the voltage to 1500, so that is one difference between this road and those about which I have been talking. That is simply

an improvement in the art, and is shown by the fact that the American Electric Railway Association in its specification recommends catenary overhead construction for other than steam railroad classifications, that was finally approved and adopted in 1923; the Electric Railway Association ddi not finally adopt and recommend its specification until ten years or more after this road was built.

In 1920, according to the proceedings of the American Electric Railway Association, there were listed 15 companies with catenary construction and 1200 volts or more, and operating something more than 400 miles of track; that list however did not include the Piedmont (329) and Northern for some reason, so it is not a complete list.

Now, talking of the Piedmont and Northern, I found that on many sidetracks the Piedmont and Northern omits the catenary construction and carries the overhead trolley suspended directly from the pole brackets or suspended from T-arms. That is similar to street railway construction, and it is construction which is common to these roads which I have been describing in the Middle states.

The overhead construction of the Piedmont and Northern through Gastonia in Franklin Street is exactly similar to the ordinary street railway construction for overhead anywhere in the country. It is common street railway construction that you will find anywhere.

I found on the Piedmont and Northern that the highest type of signals used was a selective control block system whereby the despatcher can set the signal at stop position at any passing siding where there is such a signal. That signal requires the crew to stop and call the despatcher on the telephone, and then on his orders set the signal back to its clear position before they proceed. That is a form of signal which I have seen quite often in interurban work, although a good many of that class of roads, use a form of positive automatic block signal which is controlled by track circuits the same as the steam railroads do, but this type is one that is common in interurban roads.

Counsel for plaintiffs objected to the two expressions in the last part of the witness' above testimony re-

ferring to a class of railroads as a class of interurban railroads. The court overruled the objection and refused to strike the testimony objected to.

That is not as high grade a signal system as the track circuit operated automatic block signal. It is not really a signal system, but simply a system by which the despatcher can notify the train crew to call him on the telephone.

(330) The other type of signal which is in use on the Piedmont and Northern is simply a circuit of lights that is controlled by a hand-operated switch at each end of the block; that is, a train crew entering a block throws a red light at each end of the block, and it stays on until somebody throws that switch out, supposedly the train crew when it comes out at the other end. That is not regarded as a particularly high class type of signal, and it is one which most of the interurban lines do not rely upon.

I found the poles supporting the trolley on the Piedmont and Northern, the original poles, to have been chestnut, 35 to 40 feet in length according to the grade requirements, and that to prolong the life of these poles a large number have been sawed off and bolted to reinforced concrete stubs. I noticed quite a number of creosoted yellow pinepoles, and was told that replacements since 1922 to the extent of about 40 per cent of the total have been with creosoted yellow pine poles. That is the standard specifications of the American Electric Railway Association.

And that conforms with that standard specification. It does not conform to the supporting structures on the electrified sections of main line of steam railroads, which are generally by steel structures, usually spanning the track, that is a column on each side, and spanning over the track. It is a very much lighter construction than that. Of course, some one or two of the roads of the class that I have been describing as interurban have used that sort of construction, with a steel bridge over the top of the trolley. I also found that on the Piedmont and Northern the same line of poles carry the trolley on

(331) T-arm brackets and also support one or more copper feeders and two telephone circuits, one of which is used for despatchers' use. That construction is very

similar to the construction that is usually used on the class of roads that I have been talking about. I found the main line of track of the Piedmont and Northern to be laid with 80-pound rail, with some six inches of cinder and broken stone ballast under the ties, and on a subgrade with 11 feet 8 inches top.

I found the branch lines to be laid with 56-pound rail, except the Anderson branch, which was built with 70-pound rail.

That construction is no heavier, and in some instances it is lighter than the roads which I have been talking about in the Middle States.

I found that the small double-track street cars are operated on the main line of the Piedmont and Northern in common with interurban passenger and freight trains, and that, over the five-mile stretch of track through Gastonia to Groves, street cars are operated on a 45-minute headway, and stop at any road crossing on signal, the same as any street car operation, and such protection as is had in this operation is through the type of hand-operated light signal that I described a little while ago. That type of signal I might say was in use on the first 50 miles of Union Traction operation. It was discontinued after two or three years of operation.

I found that same type of hand-operated block signal on about a mile of the main line track at Greenville, operating between the Greenville Station and the main through line through Greenville.

(332) In Gastonia, on Franklin Avenue, the Piedmont and Northern operates for about two miles in the middle of the city street, as I have said, with the ordinary street railway type of span suspension trolley construction over a T-rail, with concrete paving forming a flangeway, and with the ordinary street railway type of mate and tongue track switch, exactly similar to street railway construction and operation.

I started to say that on one of the days that I was in Gastonia I saw P. and N. Locomotive No. 5502 with 11 standard freight cars moving along that street. I also saw that train, and I am informed that all freight and passenger trains and street cars in Gastonia move through Franklin Avenue under control of the ordinary stop and go traffic lights, the same as the automobiles and other traffic along that street.

They are controlled by the red and green lights which operate through some sort of an automatic switch, alternately red and green, stop and go.

I also saw P. and N. operation in common over the same tracks with street cars of the Southern Public Utilities Company, for several miles entering Charlotte. I am informed that operation formerly was jointly over a double track, but at present the P. and N. uses one track exclusively as a single track and the street cars use the other track.

At the present time it amounts to one track used exclusively by the P. and N. and the other track exclusively by the street cars of the Southern Public Utilities Company.

(333) The overhead construction over the two tracks is exactly similar and the two tracks are similar. It is the ordinary overhead street car trolley construction.

I also saw in Greenville P. and N. freight switching operations over about four miles of street railway tracks in Greenville. *Parctically* all of that is through and along city streets and there is no signal protection whatever in that joint operation of these freight trains and the city street cars.

The operation there, as well as this operation that I *sopke* of in Charlotte, was on the standard street railway voltage of 600 volts, the equipment of the P. and N. being arranged so that it can operate on 600 volts as well as on its own 1500 volts power.

I am not sure whether the voltage of the street railway system at Gastonia is 1500 or not.

I noticed that the P. and N. trains of all classes, both passenger and freight, come to a full stop at many railroad, street and highway crossings and proceed across only after the crossing is flagged by the conductor or other train man. This is done at one crossing in Gastonia, seven in Greenville, eight in Anderson and four in Greenwood.

I also noticed that P. and N. trains regularly slow up, almost to a full stop, and come down to a dead control at very many highway *crossing* where they do not come to a full stop and flag across.

I noticed that the Belmont branch, which is some three miles plus in length, is operated by ordinary double truck street car, which has simply had one of its plat-

forms somewhat enlarged to accommodate express mat-
(334) ter. Otherwise it is the ordinary street car type.

I noticed that the express operation on the P. and N. is by the railway express agency, which operates generally on the steam railroads and on many of the interurban railways. I think I stated that its predecessor operated on some of the Indiana lines at least 15 years ago.

While riding on the P. and N. passenger train from Greenville to Greenwood, I noticed the motorman making delivery of individual newspapers by throwing them from the car to subscribers along the line and was informed that that was a regular practice and it is something that is commonly done on the class of roads that I have been describing.

I noticed that P. and N. locomotives are operated by one man only, with no definite requirement that a second man ride in the cab with the operating motorman.

And I also noticed that at a passing siding the motorman of a P. and N. train stopped at the switch, got out and threw the switch for the passing track, climbed back into the cab and pulled his train into it and then the switch was closed by a man who had been riding on the back end of the train, which is a practice that some of the interurban roads follow.

I saw the shops of the P. and N. at Pinoca and Greenville and in both places the arrangement of the shops and methods and machinery and tools, the wood shop, the paint shop, armature repair room and so on were quite similar to these interurban roads that I have been talking about.

(335) I saw nearly all of the P. and N. passenger car equipment and it is in practically every respect similar to those in use on the other railways I have been describing, each of them operated on two 4-wheel Baldwin Locomotive Works trucks with 7 feet axle spacing and about a 36-inch diameter wheel.

Those trucks which the Baldwin Locomotive Works makes are almost exactly the same that were used on the Union Traction Company and other Indiana roads in 1902 and 1903 and 1905. All but six of the 22 P. and N. passenger cars are equipped with double-end control so that the motorman can operate on either end and they

are all equipped with multiple unit control so that if two motor cars are coupled together, the motorman on the front end can operate the motors all the way through the train.

I found that all but three of the 22 passenger cars are equipped with radial drawbars, not the standard M. C. B. type of drawbar, but one which is pivoted back under the car so that it can swing and accommodate the cars in going around sharp curves. That is similar to the construction, all those matters are similar to the construction, of the roads that I have been describing.

I noticed in the operation of the passenger trains on the P. and N. that the operation is practically the same as those other roads which I have described. For instance, I counted the number of passenger stops on one trip from Gastonia to Charlotte. The train made 13 passenger stops in 20 miles, or an average of about one stop in each mile and a half.

Passenger stops were made on signal, not only at (336) regular stations and waiting rooms but on signal at all of the principal highway crossings where there are usually earth platforms erected for the safety of passengers to permit them to alight from or board trains, and usually an easily operated mechanical signal for the passenger to stop the train and sometimes with a waiting shelter and sometimes without, all of which things are similar to the roads which I have described.

Stops are made on all principal road crossings on signal of passenger for boarding passengers, and for alighting passengers, the passenger notifies the conductor, who signals the motorman. The P. and N. has 17 freight locomotives, which vary in weight from 52 to 100 tons, which are practically in all respects similar to freight locomotives in use by the roads which I have described and are similar to those in use by electric railroads prior to 1920, commonly known as interurbans.

I inspected almost all of the P. and N. locomotives personally, including one or more of each class. I think I have seen all of them. I have not gone over my records definitely on that, but I think I have seen all 17.

Every one of the P. and N. locomotives is constructed on Baldwin Locomotive Works swivel type trucks exactly the same as are in use under the P. and N. passen-

er cars. That includes an axle spacing of seven foot centers on each truck.

By swivel truck I mean a 4-wheel truck, which is so mounted that it can swivel and accommodtae itself to a curve as the locomotive goes around the curve. It swivels on a king-pin about in its center. That swivel type of truck may be contrasted to the rigid wheel base (337) locomotive which is used in steam railroad electrification almost altogether.

Q. I will ask you, how were locomotives similar to those which you saw on the Piedmont & Northern usually referred to and described in the electric railway industry prior to 1920? A. They were known as the interurban type of locomotive.

COUNSEL FOR PLAINTIFFS: We object to that.

The COURT: I think the question was a leading one, which is the main objection to it.

COUNSEL FOR PLAINTIFFS: If your Honor please, our objection was not based on the ground that it was leading, but we object because it has no pertinency in this case unless it is sought to have a bearing on the interpretation of the statutory language and as to that, we submit it as incompetent.

The COURT: Objection sustained.

Exception taken by defendant and allowed, which is its Second Exception.

Twelve of these locomotives are 4-axle locomotives, that is, each have two swivel trucks under them, and each truck carrying two motors, so that they are a 4-motored locomotive. Except for the gearing they are precisely the same as though one of the passenger cars had been lifted off of the trucks, and the trucks brought closer together and a short heavy body put on top of them as a cab.

There are 12 of those locomotives, which weigh, six of them, about 50 tons, and the other six something a little more than 50 tons.

Those locomotives are all arranged for multiple unit operation, in other words, two of them can be

coupled together and one motorman on either locomotive can operate the motors in the two locomotives, or if necessary and desirable, three of them or more can be coupled together and all operated from one control point.

The other five locomotives are similar to two of these double truck locomotives permanently coupled to-
(338) gether or articulated and with a single cab over the four trucks. In other words, it is the same as if two of the smaller locomotives permanently were coupled with one operating cab on them so that they cannot be operated separately, but there are still the four swivel trucks under them.

The motors are exactly similar to those which are used in passenger car operation. To be sure, there is a difference in gear ratio so as to give them a greater tractive effort with a correspondingly less free running speed, but in other respects, in fact, some of these locomotives were built with exactly the same motors as are in use on the P. and N. passenger cars.

I am not sure whether the motors were taken from old passenger cars or not, but they are exactly the same motors or same type of motors but with different or higher gear ratio.

As I said, 12 of the locomotives have two trucks of four motors each, and the other five with four trucks with eight motor. The heaviest one of the eight motor type locomotives weighs about 100 tons, but it has the same axle loading as the lightest locomotive, namely, about 25,000 pounds per axle.

Some of the four motor locomotives of the P. and N. run a little higher than 30,000 pounds per axle, but the largest locomotives run 25,000 and also the smallest ones. There are some of the 8-wheel locomotives where the axle loading is as low as 20,000 pounds.

The construction of all of these locomotives on the passenger type swivel trucks is the feature which en-
(339) ables them to negotiate curves of quite short radius. There are curves on the system as sharp as 48 degrees which is about 120 feet radius. There is one of that radius in Spartanburg, and one in Greenwood, and those curves can be negotiated by any locomotive on the system. Any locomotive on the system can negotiate and handle cars around those 48-degree curves.

ALBERT S. RICHEY.

The locomotives of the P. and N. today are equipped with what is known as a Pantograph collector, but I understand that those were installed within the last two years and previous to that time the locomotives were operated with a standard street car type trolley pole and wheel the same as the passenger cars today.

A Pantograph is an arrangement of rods with a sliding contact over the top. It is the arrangement shown on defendant's Exhibit B, while defendant's Exhibit A shows the trolley pole and wheel. As the P. and N. lines were originally built, manually-operated rotary substations were installed at intervals of 25 or 30 miles. That is where the alternating current is converted to direct current and fed into feeders and contact wires or trolley wires.

On the North Carolina division that spacing is 17½ miles. Considering the difference in supply of voltage, that is, the higher the supply of voltage, and other conditions being the same, the further apart the substations may be spread, and considering the difference in supply voltage, that spacing corresponds closely to that of the Union Traction and other such lines in the Middle States which were constructed from 1899 to 1905 or 1906.

(340) Within the last two years, to take care of the increasing freight traffic, the P. and N. has installed automatic mercury arc rectifier substations at points about midway between the original substations, but even with all of that capacity, the P. and N. double substation capacity runs only 74 kilowatts per route mile which is not unusual in the type of lines which I have been considering. It is very much less than steam railroad electrification power.

Steam railroad electrification, some of them will run as low as 150 and others will run up to 1,000 kilowatts per route mile depending on the amount and density of traffic that is handled, but I know of none that is—no main line steam railroad electrification—that is less than something around 125. On the P. and N. it is 78.

Q. Professor, what is the character of the construction of the Piedmont and Northern Railway? A. As far as I can tell, it is an interurban railway.

COUNSEL FOR PLAINTIFFS: We object to that.

The COURT: Yes, you cannot testify to that. You can testify as to the facts about it but as to the legal classification. * * *

After argument by counsel for defendant in opposition to the objection, the court said:

The COURT: Well, the point is this, "interurban" is an adjective which applies in a certain field, and that field is certainly not the field of construction. It may be that certain railroads commonly classed as interurban have a certain type of construction, but when Congress used the word "interurban" it certainly did not have reference to the way the road was built so far as rails and things like that were concerned, because the criterion is certainly not the way the rails were laid or anything of that kind.

(341) COUNSEL FOR DEFENDANT: "Railroad" expresses that, your Honor.

The COURT: Yes, sir. I think he can testify that this road is constructed in the same way as other roads that he knows about operated by electricity, but to say that it is interurban in construction is coming mighty close to letting this witness interpret the Act, as I see it. He can tell as to whether it is similar to other railroads that operate by electricity and render a certain class of service, but to let him put it in as an expert in a certain definite legal classification, I think is going too far.

COUNSEL FOR DEFENDANT: If Your Honor please, suppose Acts of Congress dealt with a certain kind of house or structure, a brick house, you would not get very far in having the witness testify about houses generally?

The COURT: No, sir, but if Congress dealt with a house which was say, a boarding house, or a dormitory, or some word of that kind, and the whole decision turned upon whether it fell within that classification or not, I do not think even an architect or anyone else can come down and say "Yes, I think that was a dormitory". He can tell what it is made out of and he can tell the facts and who stayed there, and how it was run and everything about it, but I think your illustration hits it absolutely.

COUNSEL FOR DEFENDANT: But Congress is dealing here, may it please your Honor, not with how the rail-

roads run, but with the right to construct the railroad. For instance, suppose this railroad between here and Spartanburg, instead of being constructed by the Piedmont and Northern, which has existing lines, was being constructed by the Piedmont and Southern, a new company, which had never done any business, and the question was whether it was entitled to construct it. The (342) test as to the right to construct a railroad which must be a test which can be applied before the railroad is put in use and operation—

The COURT: That is right.

COUNSEL FOR DEFENDANT: What can we show if this was a new railroad? We can show that it was going to be constructed as an interurban electric railroad, that it was going to be equipped as an interurban electric railroad. Now you ask the question, how is it going to be used after it is constructed? It is going to be used in every way that an interurban electric railroad can be used. How much passenger business are you going to have? I do not know, anybody that wants to ride on it can ride on it.

The COURT: You can prove every one of those facts, but you cannot let this witness substitute his expert opinion for the opinion of the Court on a vital word in the statute.

COUNSEL FOR DEFENDANT: Of course, it is needless for me to say that I shall comply with the Court's ruling, but I would like to know where I stand. Do I understand that I am instructed by the Court that in the examination of this witness and other witnesses, I cannot use the word "interurban"?

The COURT: No, sir. The court rules this, that the word "interurban" may become a necessary part of his testimony and all the questions that you ask, but that when you ask this man as an expert to put this railroad in the legal classification of interurban, this Court will sustain an objection to that question.

COUNSEL FOR DEFENDANT: My question now was as to the character of the construction.

(343) The COURT: That is right. The Court holds that the witness cannot say whether or not in his opinion it is interurban.

COUNSEL FOR DEFENDANT: In construction.

The COURT: In construction. He can tell anything

about the construction except to attempt to put it in a legal classification of interurban.

COUNSEL FOR DEFENDANT: Will your Honor allow us an exception to that ruling?

The COURT: Yes, sir.

COUNSEL FOR DEFENDANT: May we, of course, under the rule, put that testimony in under the Equity rule?

The COURT: I think he answered it.

COUNSEL FOR DEFENDANT: Will you answer it, please?

The WITNESS: I think I have answered it.

COUNSEL FOR PLAINTIFFS: As I understand the Equity rule and the practice, the proper way for counsel to do this is for counsel simply to state in the record what he expects to prove by the witness.

COUNSEL FOR DEFENDANT: I will do that.

COUNSEL FOR PLANTIFFS: That is probably briefer and more expeditious.

The COURT: (Reads the rule) * * I think the best way to do is to let him put it in himself.

COUNSEL FOR DEFENDANT: Give your answer to that question, please.

The WITNESS: I do not remember now just the form of the question.

Q. The question was, what is the character of the construction of the Piedmont and Northern Railway? A. It is interurban in character.

(344) COUNSEL FOR PLAINTIFFS: Simply to protect your Honor's ruling in the record, it would be proper for your Honor to make the ruling at that point as to what was done with that evidence.

The COURT: The court has previously ruled that this evidence is excluded on the ground that this witness, although an expert, cannot in his own words put this railroad into the legal classification of interurban. I think that covers it.

COUNSEL FOR DEFENDANT: There is no necessity of stating our exception.

The COURT: No, sir. You have already stated it.

COUNSEL FOR DEFENDANT: May I also state in that connection that this witness is not offered for that purpose, but merely for the purpose of showing the charac-

ter of the construction of this railroad, its physical construction?

COUNSEL FOR PLAINTIFFS: Would your Honor mind in your summing up as you did before, in discussing it, to also add in your ruling that the witness is permitted to testify to the character and kind of construction, the facts?

The COURT: The witness is permitted to testify fully as to the facts about the construction, the equipment and the traffic done.

The exception above referred to was taken by the defendant and allowed by the court, which is its Third Exception.

By COUNSEL FOR DEFENDANT:

Q. Professor, what is the character of the equipment of the Piedmont and Northern Railway?

COUNSEL FOR PLAINTIFFS: We make the same objection, if the Court please.

(345) The COURT: Yes, objection sustained, and the answer will be taken in the record as excluded testimony with the same ruling of the court and exception noted and allowed.

Q. Answer, please, Professor. A. It is definitely interurban in character.

To the sustaining of the objection the defendant excepted and the exception was allowed, which is its Fourth Exception.

By COUNSEL FOR DEFENDANT:

Q. What is the operation—what is the character and method of operation of the Piedmont and Northern Railway?

COUNSEL FOR PLAINTIFFS: Same objection.

The COURT: Same ruling, and the answer will be taken as excluded testimony.

COUNSEL FOR DEFENDANT: And the defendant—

The COURT: Takes an exception, and the exception is allowed.

A. The character and method of operation are distinctly interurban.

The foregoing exception taken by the defendant and allowed by the Court is its Fifth Exception.

There were three or probably four general classes of electric railways in the United States prior to 1920. The first general class I would call the urban railway, and that class would include street railways, and rapid transit lines, such as subway and elevated lines. The second class would be the suburban railways operating in the cities, and into and through the adjacent suburbs of such cities. The third class would be the interurban railway, which operated between cities and towns, with no built up settlement connecting them, that is, between separate cities and towns. The fourth class was the electrified sections of main line steam railroads.

The term "interurban electric railway" acquired a technical and generally accepted meaning in the electric railway industry in the United States prior to 1920.

CROSS EXAMINATION.

(346) Catenary construction of trolley wire is the term which is applied to the construction where there is a supporting wire or cable hung to the pole or bracket or bridge suspension and with the working trolley wire suspended from that cable at more or less frequent intervals. One reason for it, is to keep the level of the trolley wire more nearly constant over the rails than where single suspension is used, and the other is incidental, that if the trolley wire breaks there will not be as long a part of it that falls to the ground. The electric trolley wire is not self-supporting for the full distance between the poles and brackets, but it is hung on what is generally known as messenger wires or cables, and there are sometimes two of these instead of only one as here on the P. and N.; these cables are usually of steel or something stronger than high conductivity copper.

I am now retained as consulting engineer by two

electric railway companies, full time employment. I severed my connection as Chief Engineer of the Union Traction Company of Indiana in 1905, and have since had part time connection with the school at Worcester, Massachusetts. Between 1905 and 1920, I was retained several times by the Indiana Company in connection with various matters. I kept in touch with the development of that company. In my direct testimony I refer to railroads located in Indiana, Ohio, Illinois and Michigan, and I think perhaps to one in Iowa. My principal references were to roads in the Middle States section of the country. I said that the development of the electric railroads between cities from 1900 to 1915 was quite rapid. I don't know of any new construction to any extent in 1917 or after that time! I think the development remained about stable from 1917 to 1920. In most of my testimony I have referred to roads located in the Middle Western states. I may have referred to one or two in New England. There are some such roads as those in New England and in New York City and in Pennsylvania.

(347) I think that practically all of the electric railroads operated between cities to which I referred had some of the characteristics which I testified to. The ones that I referred to were not the ones which, in my opinion, had the fullest development and presentation of these characteristics, but were the ones with which I was the most familiar. They were the ones I had personal knowledge of. When I referred to electric railroads that interchanged traffic with steam railroads before 1910, I was referring to the railroads which I have mentioned, and the same is true of my reference to electric railroads which derived a considerable portion of their total revenue from interchange with steam railroads. As to having in mind the percentage amount or proportion of revenue derived by such roads from interchange of freight with steam railroads, when I was testifying I had definitely in mind only one approximate figure that I remember as applying to one of these roads, which was the Waterloo, Cedar Falls and Northern; that is in Iowa. That line operated city street car lines in one or two of those cities as well as interurban lines in freight. In 1916 or 1917 their freight revenue alone was approximately 40 per cent of the total revenue.

I remember the railroads which I mentioned in my direct testimony operated through the streets of the cities and towns along the right-of-way. I know that in one or two cases, in some places the road had by-pass freight tracks around the cities; that, however, was the exception rather than the rule. I can not offhand give you the percentage of the mileage of these roads that was in city (348) streets; however, as an instance, I remember the Union Traction Company of Indiana, in its line of 54½ miles from Muncie to Indianapolis, was on the city streets of Muncie for approximately a mile, through Yorktown about a quarter of a mile, and Chesetrfield perhaps one-eighth of a mile, Anderson about two miles and a half, and Pendleton a quarter of a mile; Fortville, three-eighths of a mile and in Indianapolis a little over four miles, not over its own track, but over the tracks of the Indianapolis Street Railway.

The heaviest locomotives that I remember on those roads were 55 or 60 tons. Most of them did not own much freight equipment, although some of them did. I think the Illinois Traction System had some 250 or 300 cars; the Cedar Falls road something over 100. I am not familiar witht the amount of interchange of freight that these roads had with steam railroads. I don't think any of them interchanged as much as 93 per cent of carload freight, or received as much as 94½ per cent of their revenue from freight. In these answers I am excluding the electrified sections of steam railroads. In every case in describing that class of railroad I intended to specifically exclude the electrified main line sections of steam railroads.

I can not quote the exact figures, but from my knowledge of the business, I think that one or two of the roads I mentioned had as great a percentage of its total traffic interstate, as 95.7 per cent; these two interurban roads were practically operated as one, the Dayton and Union, and the road which operated from Union City to Muncie; they were operated as a single road. The cars of each line ran the through route, and I think when (349) they were so operated the interstate traffic was probably somewhere in that neighborhood. I am sure that the Fort Wayne, Van Wert and Lima, which was an interstate road, did an interstate business, that was a very large part of its total business. I don't know the

proportion of local as compared with interchange traffic on these roads. I might also add to the list the Detroit, Monroe and Toledo, an interstate road which did a very large amount of interstate business. I can not say whether it was 95 per cent or not. In reference to these roads, I am speaking of the period in general from 1905 to 1915. I can not say as to whether or not any of these railroads to which I have referred during the first five years of their operation earned from their freight traffic as much as Four Million dollars for the first year, increasing year by year, until for the sixth year the earnings would amount to $5,500,000 to $6,000,000. I have not the figures available.

From my examination of the P. and N. and from my experience and observation, I think it is able to convey freight of all kinds the full length of its respective sections of line safely and with reasonable expedition, up to the limit of its substation and locomotive capacity. I cannot state in cars or tons what that limit would be. In my examination I did not see any evidence of its capacity being exceeded. In places they are approaching their capacity in the use of their substations. There is a definite limit to the power which they can put out on the line, just as there is a definite limit to what the locomotives can handle. That power can be increased by the erection of additional substations and the installation of (350) additional feeder capacity, which, however, would become uneconomically expensive with the present voltage if it were increased to any great extent. Its tractive ability can be increased by the use of additional electric locomotives, subject to the limitations of the substations and feeder capacity and voltage.

In the present state of the art, there is a limit to the amount of voltage that the P. and N. can use as motive power; there is another limit set by financial considerations. If any change upward from 1500 volts were made, it would mean rebuilding all the substations and all the overhead equipment, together with the locomotives. The science of electrification of railroads has progressed pretty well; development is being made, and, in my opinion, will continue to be made.

I was connected with the Union Traction Company of Indiana from its organization in 1899 or 1900 until September, 1905; I have been employed by it since; at

the last I was its Chief Engineer. I saw the figures in reference to its operation and revenue from time to time. I don't question the figures which you read me that in 1917 its freight revenues were $262,000, and its passenger revenue $2,588,000.00; nor would I question the figures you read me that for 1920 it reported to the Interstate Commerce Commission a freight revenue of $589,000 against total operating revenue, passenger, freight and all, of $3,710,000; that shows a relative increase in freight as compared with passenger of about 15 per cent; that about fits my recollection; that road did not do a heavy freight business. Nor would I question the figures you read me for that road for 1923, showing freight reve-
(351) nue of $685,000 against total operating revenue of $3,890,000, or 17.6%; I think that was about the proportion they are doing.

You read me figures for the Illinois Traction System, or Illinois Traction, Incorporated; I knew it as the Illinois Traction. The figures you read for it for 1928 are, freight, $118,000; passenger, $275,000. These figures are much smaller than the system I knew in 1905 and 1910 and on to 1920. It was a much larger system than that, comparable to the Union Traction, with revenues over a million. I am not familiar with it in 1928; there have been changes in its corporate organization with which I am not familiar. I mentioned the Detroit United Railway; I would not question the figures you read that its mileage in 1917 was 319 miles, nor that in that year it handled 13,523,000 passengers, because at that time it owned the Detroit City Lines and that would include city passengers; nor do I question that in that year its freight revenue was $373,000 and its total transportation revenue $14,000,000, because it had a large amount of revenue from its Detroit City Lines, which it sold to the City Lines of Detroit in 1920 or 1921. I would not be surprised if the figures for the road in 1923 were $468,000 freight, as against total operating revenue of $4,872,000, only 9.6% of the total. I did not have any impression regarding difference of these figures for 1923, but I knew it did a considerable freight business. I would say that $460,000 worth of freight business on the mileage that they have is a considerable freight business. I would not question your figures; it
(352) was about that time that what was left of the

Detroit United after selling the City Lines got into financial difficulties and went into a receivership, and has since been reorganized. I don't know the date of the reorganization. I know that it is now known as the Eastern Michigan. I would not be surprised if the figures you read for this road for 1928 of $269,000 for freight revenue and $2,000,000 for passenger revenue are correct, because the road was in difficulties and quit operation of a good part of its mileage, and such a reduction from the 1923 figure would not surprise me. That road was never predominately a carrier of freight of national importance.

I think that the road I referred to yesterday was the Terre Haute, Indianapolis and Eastern, and also the Indianapolis and Cincinnati had freight revenues probably on the same order as the Union Traction of Indiana. The figures you read me for 1917 for the Terre Haute, Indianapolis and Eastern, that the total passenger revenue was $2,398,000 and freight $229,000, are about the same as the Union Traction, around 10 per cent.

I can not say that I have been familiar with the revenue and proportions of revenues of these electrically operated railroads during the years which I have testified. I have seen a great many such figures. I would not be surprised that in 1917 the reports for all of these railroads showed a total percentage of freight revenue to total revenue of 10.3 per cent. The total mileage you read me of 15,982 miles is probably about right. I don't know the number of such roads reporting to the Commission. You read me for the year 1920 that the percentage of freight to total revenue for such roads is 12.1
(353) per cent; that is increasing some. From my inspection of the P. and N. road, I did not think that it was a very poorly constructed and poorly operated railroad, and did not mean to leave that impression, that is, as an interurban railroad; nor did I mean to leave the impression that it was not physically capable of handling the freight traffic that it does handle. I know of the freight traffic it handles just as I have heard the figures there in this court room and I have made no independent study of its traffic, only as I saw the freight and passenger business moving over the road. The place where I saw the operation of freight traffic under traffic

signals, to which I referred in my testimony, was at Gastonia; I did mention the trains stopping and one of the trainmen going ahead to flag crossings in the South Carolina Division and I think I gave the number of crossings on which that practice was followed. There is no place on the P. and N. line between Spartanburg and Greenwood where freight trains are stopped by street traffic signals that I saw. The only place I found such a condition was one street in Gastonia; Gastonia is the southern terminus of the North Carolina Division. At Gastonia the P. and N. swings into that street on a curve from, I think, a private right-of-way; it comes in by an underpass under the Southern Railway double track and runs into that street and operates on it about two miles. I don't know just how much of this two miles is main track. After going into that street and running on the street for some distance, it turns off into the freight terminals. I can not say just what that distance is; think it turns off into the freight terminal before it gets to the passenger terminal. I think it runs along that street (354) about three blocks to the point where the passenger trains turn down to the passenger terminal. Beyond that there is nothing in the way of a terminal that I saw. On down the street is a street car track regularly operated by street cars; it is one of the street car tracks over which there is freight operation; it is simply a track which leads to serve an industry, the Lorraine Mills, as to freight, but the P. and N. operates that street railway system and those street railway cars.

Where I saw the traffic light stop a freight train was on down the other part of Franklin Street; it may have been a switch movement; as I remember it, one of these stop lights is between the branch-off of the freight terminal and the point where the track comes on to the street; I saw a freight train stopped by a signal light in Gastonia. I don't remember just the location.

The top of the fills of the P. and N. are 11 feet, 8 inches wide. The poles carrying the trolley are located just outside the shoulder. There is a line of poles only on one side; I saw no subgrades on top of the fills as wide as 18 to 22 feet; I measured these widths by the relative length of the cross ties; I did not actually put a tape on them. I was told by an official of the Company that they were 11 feet, 8 inches. The cross ties are

generally of white oak; seem to be sound; they average closer than a 2-foot spacing, there being just about a shovel width between the ties, and that is good railroad construction. The ties are in good condition; I noticed nothing to indicate that they were not fully and well spiked; I saw tie plates on some of the curves; that is (355) good standard railroad construction. I saw no indication that the spikes were pulling out and loosening the rails from the ties. The rail I noticed is in good condition. As far as I saw, the joints between the rails were in good condition and the joint bolts tight and in good condition; the line of the surface of the track is good. I judge that the ballast was about six inches deep by the height of the tie above what I could see of the top of the subgrade outside of the ballast; I saw stone and cinder ballast. The ballast looked good; it is a well ballasted railroad. In city streets the switch work was such as was usually used by the street railway in contrast to open track split switch; that is spring and frog. In these city streets there is what street railway men call the mate and tongue type of switch, a moveable tongue not connected with any switch and, uusually turned with the switch rod just as in street railway operation; they are not always equipped with a spring. You asked if all railroads do not use this type of switch in city streets; I have seen considerable modification of it by the New York Central in city streets in Syracuse where the tongue is held in one position by a piece of apparatus that corresponds to the switch stand which can be locked in either position. If there is one general type of switch that steam railroads use in the Southeastern part of the United States in paved streets, I don't know about it. In open track construction the P. and N. uses switch stands; I mean out on the line; they have a good standard type and so far as I know, in good condition, and have locks and are properly operated. Apparently the roadbed is well drained and well provided with culverts. The bridges are the same type as that used by steam roads, although I don't know (356) about their weights or what they are designed to carry in comparison with steam railroads; the bridges having a steel superstructure are based on masonry; the masonry appeared to be in good condition.

One of the 48-degree curves which I referred to on

direct examination was at Greenwood; think it was on a Y-track; I saw it from the train. I took the 48 degrees from information furnished me, but in looking at the curve it appeared to be about 120 feet radius, which checks with the 48 degrees. I don't know when this track was last used. The other 48-degree curve I spoke of was in Spartanburg. It is on a Y-track at the freight yard, I think. It is customary on all railroads for Y-tracks to be built with considerable curvature, depending upon the equipment to be operated over it. I did not measure the curve at Spartanburg, but it seemed to me to have a radius about 120 feet, which would check with the 48-degree curve which was given to me and which I accepted.

The locomotives of the P. and N. have standard automatic couplers and so do the freight cars. The passenger cars have automatic couplers; the freight cars appear to me to be exactly the same sort of equipment as the ordinary steam railroad freight car. I saw the locomotives in nothing except freight service and I have been told that they do nothing else but freight work; certainly it is not the practice for them to haul long trains of passenger cars now; the passenger movement is with one or more cars, which may or may not be independently motored. I think some of their passenger cars have no motor equipment, but are trailers; some-
(357) times they have one motored with a trailer and sometimes two motored ones hooked together, and sometimes more than two. If a particular freight train to be hauled is too much for one locomotive, they couple two of them together. I have seen that done; that is multiple operation. If necessary they can treble them and put three together as long as they don't exceed the capacity of the substation or the distribution line. I have not heard of such an operation as putting three of them together; it is physically possible. Putting a double header together makes these small locomotives approximately the same power as one of their 8-wheel locomotives. The Company has some of these 8-wheel locomotives which are to all intents and purposes simply two of the smaller ones permanently coupled together. They could couple together two of these double permanently coupled locomotives and operate them in multiple if the substation capacity and distribution system would handle it.

ALBERT S. RICHEY.

I have seen photographs of three electric locomotives of the Virginian Railway on one train coupled up together; I have never seen three on the New York Central or the New York, New Haven and Hartford; I am familiar with that; it is electrified as far as New Haven, about 75 miles out of New York. I did not calculate how many loaded freight cars one of the double header engines of the P. and N. could haul. I did not see any trains of from 50 to 60 carloads, and I made no calculation, nor could I say whether these engines could draw such trains or not. Whether it could be done as a regular thing or not would not necessarily answer (358) your question, because a locomotive or pair of locomotives might be overloaded; the motors might be overloaded in such operation, and while it could be done for one time a few miles, continued operation would stop the motors and the operation would soon put an end to itself. In other words, it is not an economical proposition to overload any machinery. The electric motor will take the load if you put it on beyond its capacity to handle for a few seconds at a time. With a steam locomotive you can overload it to a point where it is not economical, but you approach a dead line with such a locomotive where its power just drops off and it stalls quicker than you do with an electric locomotive in proportion to their rated capacity. I suppose there is a point with the steam locomotive where you are simply extravagantly burning fuel and are not getting tractive power by reason of the overloading.

I said that the locomotives have swivel trucks and swivel on king pins; the New York Central does not have exactly the same type; they may have a swivel truck, but it is a considerably longer rigid wheel base. The rigid wheel base of the engines on the P. and N. are 7 feet, which means the measurement between the axle and the axle on one of these swivel trucks. Possibly the New York Central has on its electrified portions for operating freight trains, electrical locomotives with swivel trucks and with the rigid wheel base of 8 feet, 3 inches, but I expect that such a locomotive would be used more for switching service. The P. and N. locomotives are used both for line and switching service.

The P. and N. has regular despatchers who despatch (359) and forward their freight trains. As far as I am

familiar with steam railroad practice, the P. and N.'s freight trains operate under train order and by clearance cards the same as steam railroads do. I believe they have train registers; steam railroads do. The P. and N. has a selective block system; they have these signals at certain specified places, any one of which can be thrown to the stop position by the despatcher. I said that only one employee was required to ride in the cab of the locomotive; I mentioned that because as far as I know, it is the universal practice with electric locomotives on electrified sections of steam railroads for the second man to ride in the cab for safety's sake. The selective signals are operated electrically through a selective system by the despatcher; I notice no different board from what I have referred to as a selector signal except those which are operated manually which I have described.

Correcting a statement I heretofore made relative to traffic signals at Gastonia, there is no such signal before the freight train turns off; there are two or three of them before the passenger cars turn off of that street.

If a particular freight train of the P. and N., operating on its main line, is to meet another train, the train crew is furnished with a meet order. One of the functions of the selector signal system is to give a signal to the train crew, or both train crews, in case there is to be a change of the train order, or the meet order which has already been furnished to the crew. As I understand, if the disptacher wants to communicate with the train crew for any purpose, for instance, the correction of a train order, he can do so; he throws the se-
(360) lective signal at a point where he believes is in front of that train and the train stops there and he calls the despatcher; as I understand the rule, when one of these signals is at stop position, it means that the first train to arrive there is to call the despatcher over the telephone. I did not examine any of these train orders, but I rode in the motorman's vestibule on all of my trips and saw him have train orders. The bunch of light yellow pieces of tissue paper written upon with indelible pencil which you hand me appear to be such train orders, and I know that they do operate their trains on train orders similar to that.

Before the P. and N. train leaves its point of origin,

I presume that the conductor or engineer or train crew has a clearance card. I don't know definitely that that is a common operation on steam railroads.

I don't know what the rules are as to employees composing a train crew, or what are the requirements of a proper train crew. I don't know the full details as to the train crew; I have seen freight trains operate with a motorman, a conductor and other emauployees. I don't know what their destinations are, nor do I know how many other employees besides the motorman and conductor there are. The freight trains of the P. and N. have air brakes, including the cars, if they are so connected up; I presume they are connected up in main line operation.

I stated that at certain points on the line the trains of the P. and N. come to a full stop and send an employee ahead to flag the highway crossing. I saw the operation but I can not give you the name of the streets; I saw it in a passenger train and was told the same rule (361) applied to freight trains; I presume it is done in compliance with ordinances of the particular town, probably applying to all railroads operating in those locations. I saw it done in Gastonia, Greenville and Greenwood; may have seen it and did not realize what was being done at other places. I think the P. and N., where it crosses the graded line of a steam railroad, stops. There is no interlocking plant on its main line; I saw them go across what I presume were industrial tracks of steam railroads without making such stops; I saw no interlocking plants on the road; I don't know whether it is the universal practice in railroading to stop before crossing the main line of another railroad where there is no interlocking plant; I know of places in interurban practice where that is not done. I can not answer as to common practice in regard to this on steam railroads; I am not familiar enough with their operation. I believe that the P. and N. constantly does switching to certain industries over industrial tracks of the Southern Railway, and that the Southern Railway does switching over the tracks of the P. and N.; I was told when we went over the line that this line belongs to the Southern and we operate over it, and this line belongs to us and the Southern operates over it. I saw tracks where I was given information both ways; I could not say how many of each.

I did not examine and read the rule book for government of employees by the P. and N.

JONES FULLER, a witness for the defendant, testified:

I am an attorney at law at Durham, N. C., and Vice-President of the Durham and Southern, its General Counsel; have been connected with it as counsel since (362) about 1904, before the road was completed. Was Assistant Secretary since 1923. Think the road was completed about 1905 or 1906. Benjamin N. Duke was the principal promoter and owner of the road at its inception. Think he was its President from its beginning until his death; think Mr. Duke died in September, 1928. Prior to the organization of the Durham and Southern, Mr. B. N. Duke owned a road known as the Cape Fear and Northern from Apex to Dunn, which became a part of the Durham and Southern. The Durham and Southern merely extended that road from Apex to Durham. The Durham and Southern extends from Durham down to Dunn. Since B. N. Duke's death, Mr. E. Thomason has been President of the road. He became connected with the road about seven years ago as Vice-President and Assistant to the President. Prior to the time that Mr. Thomason became connected with the road, its earnings had gradually decreased and its management was quite unsatisfactory. I think at the end of 1922 there was a deficit. Its earnings had gradually decreased. The whole thing seemed to be badly disorganized and Mr. B. N. Duke realizing that something had to be done to save the property and that someone would have to be gotten to efficiently and properly operate it, asked Mr. Thomason to take charge. Mr. Thomason's connection with the Piedmont and Northern did not have anything to do with his selection for this position with the Durham and Southern, not so far as I have heard or known.

I never heard of the Piedmont and Northern entering into the selection of Mr. Thomason to his position with the Durham and Southern. Mr. J. B. Duke was never a director or officer of the Durham and Southern. (363) I have attended the directors' and stockholders' meetings of the Durham and Southern since 1912. Mr. J. B. Duke took no part in the direction and manage-

ment of the road, never attended any stockholders' meeting at which I was present and I never heard of his attending any; of course, I was not pesent at all of them but most of them. General officers of the Durham and Southern are in Durham, N. C. I have never been in the general offices of the Piedmont and Northern and of my own knowledge I don't know where they are. There is no relationship or association whatever between the Durham and Southern and the Piedmont and Northern. The Durham and Southern is not operated together with any other railroad; it is operated and managed separately. The Durham and Southern is now subject to recapture of excess earnings by the Interstate Commerce Commission and has been for three years or more. It has paid to the Commission under the recapture provision $53,000.00 or $54,000.00. As general counsel of the road I have been in touch with this recapture matter; of course, I have not kept the accounts but my information from the Auditor is that in making this recapture the Commission computed the amount due it under the recapture provision upon the basis of the earnings of the Durham and Southern alone and the value of its property alone. The Commission has not put the Durham and Southern and the Piedmont and Northern together for recapture purposes.

All of the Directors of the Durham and Southern with the exception of Clayburn Carr, who formerly lived in Durham, but who now lives in New York, W. C. Parker of New York, and Mr. Thomason of Charlotte, (364) are local gentlemen living in Durham. There are fifteen directors.

CROSS EXAMINATION.

As Counsel for the Durham and Southern and in the recapture proceeding, I have not heard of any one having submitted to the Commission a claim that the Durham and Southern excess earnings should be affected in any way by the earnings of the Piedmont and Northern. I am not familiar with the details of the recapture proceeding, as it is being handled largely by attorneys in Washington. I have been in Washington once or twice and conferred generally with these attorneys. I am not familiar with the details of the matter, know nothing

about the accounting end of it. The Commission took our money when we paid it, still have it and are asking for more.

We are still litigating with the Commission attempting to show that it is not entitled to as much as it is asking for in the recapture proceeding. I am engaged in the general practice of law in Durham. My firm also represents the Seaboard Air Line Railroad Company. We represent the tobacco interests, but I do not know that they are called the Duke interests any longer, don't think the Dukes own any interests in the tobacco companies now. I am familiar with the Durham and Southern and know pretty well the history of the Railroad. So far as I know I never knew Mr. J. B. Duke in connection with the Durham and Southern. He may have entered into it but the man I knew as the sponsor for the extension of the Durham and Southern was B. N. Duke, who was the older brother of Jas. B. Duke. I think they were very intimately related and associated together in business matters. I don't know to what ex-
(365) tent Mr. J. B. Duke was interested in the Durham and Southern. I cannot say as to the number of shares of stock outstanding in the Durham and Southern in 1911—as I recollect and from looking at a list this morning, the number is now 5,300. It may have been 6,000 in 1911. I think at that itme Mr. B. N. Duke and Mr. J. B. Duke owned quite a large majority of the stock. I did not say that Mr. Jas. B. Duke was not a stockholder. I said he was not a Director and I said I never saw him attend a stockholders' meeting.

I have some knowledge of the relationship between the Durham and Southern and the S. A. L.; what I know about it is known both in my capacity as a lawyer and as an official of the Durham and Southern; I know there is a contract between the S. A. L. and the Durham and Southern which covers the use of terminals and switching of trains of the Durham and Southern, but I don't recall what provision there is about the division of revenue. I think that this contract fixes the terms upon which the two roads divide revenue but I don't recall how much. I can not say that I recall that the Durham and Southern gets a large portion. I don't know when the arrangement was entered into. I think the S. A. L. makes the Durham and Southern its preferred connec-

tion to get into and out of Durham on a great deal of business. I think so but don't know.

I think I would change my answer in respect to "preferred"; I don't think I understand that. What I had in mind was that we, of course, have to come in on the Seaboard's tracks as I understand it and it uses our switching and we use its terminal, but I could not say that it makes us its preferred connection in the (366) sense that we get any more freight from the Seaboard than it would give to any other railroad that renders the same service. I don't know the provisions fixed by the contract. I don't recall any provision of the contract which obligates each of the roads to the extent of its ability by solicitation and otherwise to cause shippers to route their goods via the other road. I am not very familiar with the contract. I have seen it but don't recall a provision of that sort.

I am not Counsel for the Duke Endowment. I don't know how building materials for Duke University were shipped in nor who had control of the routing of the business; I think most of the stone, which was quarried up near Hillsboro, N. C.; came by the Southern. I suppose all of the stone came from Hillsboro, N. C. I don't know whether they used any stone from Indiana or not.

I think Mr. Thomason became President of the Durham and Southern in 1928 just after the death of Mr. B. N. Duke, and since that time the business and the affairs of the Durham and Southern have gradually progressed and it has become a very prosperous little railroad. It started to making money as soon as it got proper management, after Mr. Thomason came in, had time to reorganize it, get it on a good basis and properly operate it. Mr. Duke brought Mr. Thomason to the road. It is not a fact that practically all of the general managing officials of the Piedmont and Northern are in charge of the Durham and Southern. My understanding is that Mr. Hardin, Auditor, renders service for the Durham and Southern for which he is paid; Mr. Cureton in connection with the Traffic Department, of which Mr. Donald Lumpkin is head of the Durham and Southern, (367) renders some service for which he is paid by the Durham and Southern, and may be, I don't know Mr. Lagerholm, the Assistant to Mr. Thomason, whether we pay him anything or not; he is an officer of the Durham

and Southern, yes! he is an Assistant to the President, and W. T. Gill is Assistant to the General Manager. Yes! Mr. Cureton is connected with the Traffic Department. If he has title of Traffic Manager, I don't know it. I thought Mr. Donald Lumpkin was Traffic Manager. Mr. Lumpkin performs the duties of General Freight and Passenger Agent, but he has always been known to me as the one in charge of the Traffic Department. I have understood that the Durham and Southern has a traffic representative in Cincinnati. E. B. Hardin is General Auditor of the Durham and Southern. I don't know that he keeps the books of the Company as General Auditor; a great deal of the bookkeeping; not all, is done in Durham. We have an Auditor there, he is Mr. Martin. He is under Mr. Hardin. I know that Mr. Thomason has an office in Charlotte. I have been in his office and have been in that building. The Durham and Southern has the same Chief Claim Agent, J. V. Sutton, as the Piedmont and Northern. I suppose the Durham and Southern pays him a salary, but don't know. I know the Durham and Southern has a soliciting agent in New York but don't know who he is; I don't know who pays his salary, but I suppose the Durham and Southern does. I know that we have an Agent or soliciting man in Atlanta? I don't know that we have a soliciting office in Cincinnati. I don't know that we pay this man in Atlanta to whom you have referred.

I know who the stockholders of the Durham and (368) Southern are. 5,000 shares of the total 13,500 shares are owned by the Newton Investment Corporation, 535 Fifth Avenue, New York; I only know by hearsay, but I understand that sometime before B. N. Duke's death he organized this corporation and I am informed that he transferred to it certain property owned by him —I think for some matters of taxation. I am familiar with the address of 535 Fifth Avenue, New York. I know that the Duke Interests and organizations have headquarters and offices on some floors of this building. I don't recall, but I don't think that the Durham and Southern has an office there. Mr. Parker is Secretary and Treasurer of the Durham and Southern, has an office in that building. I don't think the Newton Investment Corporation is recognized as one of the Duke companies; think it is just a corporation organized by B. N.

Duke for his own private use and convenience to which he transferred securities as I understood because it made a more favorable tax situation for him. It was organized before B. N. Duke's death. I don't know who now owns it; I don't think it is closely allied with these Duke Power interests and the Duke Endowment and what is left of the Jas. B. Duke estate. It is not a corporation that has any business or does any business.

There is another stockholder, the Pearson Company, which I understand was organized for the same reason as the Newton, except it was organized by Mrs. B. N. Duke; then there is the Linden organized for Mrs. B. N. Duke's daughter, Mrs. Anthony Biddle; it is my understanding that each of these was organized for their convenience and a matter of taxation, but they transact no (369) business, and, therefore, I say that so far as I know they have no affiliation with any of these other companies that you refer to. The 5,000 shares of stock of the Newton Investment Company in the Durham and Southern is voted by a proxy as a rule, but I don't know who signs the proxy; I think as a rule I vote the proxies, they being sent to me, I don't recall who sends them, but probably Mr. Alex H. Sands; I think he was an employee of Jas. B. Duke and also of B. N. Duke. I knew him more as a representative of B. N. Duke and now of Mrs. B. N. Duke; that is Alex Sands, Jr.

Nanaline H. Duke is the widow of James B. Duke; Doris Duke is his daughter. As I understand, the 3,000 shares of stock of the Durham and Southern listed in the name of Nanaline H. Duke, Trustee for Doris Duke, is owned by the widow of Jas. B. Duke for the beneficiary interest of his daughter. I don't know what the Rock Point Investment Corporation is, which owns 2,840 shares of Durham and Southern. I don't know whether it is a so-called Duke Company or not; don't know a thing about that. I don't recall having received any proxies from the Rock Point or from the Linden Corporations. I may have. I think I do recall having received proxies from time to time from the Pearson and Newton Corporation. I don't know who votes the stock of the Rock Point Investment or of the Linden Investment Company. Angier B. Duke was the son of Benjamin Duke. Anthony Duke was the son of Angier Duke and the grandson of B. N. Duke. As to the 298

shares of the capital stock of the Durham and Southern on the report of that railroad to the Interstate Commerce Commission as being in the name of J. B. Duke; I don't know what that means. The report I have before me shows this as being 200 shares; I assume that (370) it is in the estate of J. B. Duke and has not been sold or transferred on the books. There is no other living J. B. Duke in these families.

RE-DIRECT.

The ownership of the stock in the Durham and Southern by J. B. Duke and B. N. Duke was not a joint ownership, but was a separate ownership as to each of them; each one owned his own stock. So far as I know they never have owned any stock in the Durham and Southern jointly. I think B. N. Duke was the largest stockholder it had.

N. W. STORER, a witness for the defendant, testified:

I live at Pittsburgh, Pennsylvania; graduated from Ohio State University in 1891 with degree of mechanical engineer in electrical engineering; entered the employ of Westinghouse Electric Manufacturing Company and have been with them ever since. Soon after I started to work I was put to work on street railway motors and helped to devise the first successful multi-polar street car motor ever built, which practically set the type for all railway motors since that time. I worked on the development of the induction motor and other alternating current machinery; became first assistant to the Chief Engineer for the Westinghouse Company; and under his direction developed a complete line of multi-polar direct current motors and generators; I followed the development of the new street car motors, and my work in that line broadened and developed and I was given charge of the design of all direct current apparatus, not only for railway, but for other purposes; in 1904 I was (371) made engineer of the Railway Engineering Department and gave up practically all other work and had full charge of the development of street railway motors and control, and motors for all classes of railway work

until 1912; since that time I have been consulting railway engineer of the Westinghouse Company. I devised a system of rating for railway motors about 1901, which was adopted by the American Institute of Electric Engineers as standard in this country, and has since been approved practically as originally developed by the International Electro Technical Commission, which includes practically all civilized countries. I am a Fellow of the American Institute of Electrical Engineers, Member of the American Society of Mechanical Engineers; Engineers' Society of Western Pennsylvania, Pittsburgh Railway Club and two or three other societies. Was at one time a member of the Electric Transportation Committee of the American Society of Mechanical Engineers; served two terms as Vice-President of the American Institute of Electrical Engineers; for several years have been a member of the Standards Committee of the American Institute, and am now Chairman of the Working Committee of the Standards Committee on traction motors; am also Chairman of the Advisers of the U. S. Committee of the International Electro-Technical Commission, on traction equipment.

I have designed locomotives for all classes of railway service, steam railway electrification, including switching locomotives, transfer and high speed passenger, both of direct and single phase alternating current and in direct current designed locomotives for 600, 1200, 1500 and 3000 volts, and designed and built one equip-
(372) ment experimentally for 5000-volt direct current.

By COUNSEL FOR DEFENDANT:

Q. Have you designed locomotives for electric railways commonly known as interurban electric railways?

COUNSEL FOR PLAINTIFFS: We object, if your Honor please. We do not mind the witness' describing every kind of a locomotive that he has ever designed, but when it comes to his classifying the road as interurban or not, we think that crosses the line.

THE COURT: Well, he said commonly known. People use the word "interurban" in a common sense, and whether that is the way Congress used it or not I will have to decide, but I think that it suggests, puts into this witness' mind, a type of railroad that the world has

commonly called the interurban. Whether the Piedmont and Northern is in that class as a matter of law or not, his opinion is not binding on me, but we have to get ahead somehow or other, and I don't see how we can do it unless we let him use common terminology. I am not going to sustain that objection, I am not going to let this witness say that this railroad is an interurban or is not, because then he would be tending to encroach on the province of the Court, but as to whether a certain machine is used on roads commonly called interurban or not, I do think he can testify.

The WITNESS: Yes, sir.

(373) I designed the electric locomotives and the other electric equipment of the Piedmont and Northern. The contract with the P. and N. called for locomotives off 55 tons weight, guaranteed to haul a load of 800 tons; they were light locomotives and were for light traffic as compared with traffic on the main line of a steam railroad. The photograph which you show me, defendant's Exhibit H, purporting to be an electric locomotive of the P. and N., No. 5004, is a correct representation of it as we sold it except for the addition of pantograph trolley; when it was sold it had a wheel trolley. The contract weight for this was 55 tons; actually it weighed a little less than that, about 53, as I recollect. The axle loading would be just one-quarter of 55 tons, or about 27,500 pounds; it has four motors, each given a 1-hour rating of 185 horsepower, making a total of 740. It has swivel trucks, just such a truck as you see on cars except I believe a little more rigid in its construction and built for this pulling work; its wheel base is about 7 feet and the motor mounted on each axle; the same frames and the same size of motors and dimensions as is used on heavy cars, multiple-unit service.

The photograph you show me, defendant's Exhibit I, being P. and N. locomotive No. 5602, is a correct representation of that locomotive which I saw this morning; the weight of that is given as 100 tons, and if the load is equally divided, it makes 25,000 pounds per axle; that is, in effect, two 50-ton locomotives permanently articu-
(374) lated together, about which Professor Richey testified; the motors are rated at 125 horsepower each, and the eight of them make 1,000 horsepower; that is one-

hour rating and it is not continuous; continuously it is much less.

Defendant's Exhibit J is photograph of locomotive of the Virginian Railway, and is a correct representation of those locomotives. It takes three units to make one of these locomotives. The weight of each unit is 427,400 pounds, of which 307,500 is on drivers, making an average axle loading of 76,900 pounds; on 2.2 per cent grade, which this road has on its line, each unit carries 1,000 tons; two locomotives, one at the head of the train and one at the rear, takes 6,000 tons up that 2 per cent grade, or 2.2 per cent grade at 14 miles an hour approximately. One locomotive, that is the three units, should be able to carry about 5,600 tons on 1 per cent grade. The 1-hour horsepower rating of those locomotives is 2,030 per unit at 14 miles per hour and 2,375 at 28.3 miles per hour; the total rating of the entire locomotive would be three times that horsepower.

These locomotives are radically different from those used by the P. and N. The P. and N. locomotives are very light in axle loading; they have swivel trucks with the pull through the center pins whereas the Virginian is a rigid frame like the steam locomotive with motors geared to a jack shaft at either end of the locomotive and side rod connections from the jack shaft to the two pair of drivers on each end. The wheels are 63 inches in diameter, as against about 36 inches, which I believe it is on the P. and N. locomotives. The rigid wheel base is, I believe, 16 feet 9 inches on the Virginian.

(375) The picture you show me, Exhibit K, correctly represents an electrical locomotive in use on the electrified section of the Pennsylvania Railroad. This locomotive weighs approximately 204 tons, with a tonnage rating of about 2,000 tons up a 1 per cent grade. Its axle loading is 77,000 pounds on each driving axle; horsepower rating 3,300 horsepower one hour rating and 3,070 continuous rating. The Virginian and the Pennsylvania Railroads both use 11,000 volts single-phase alternating current. Neither the Virginian or the Pennsylvania Railroad locomotives shown in these photographs would be suitable or feasible for use for an electric railroad like the P. and N. The electric locomotives of the P. and N. would not be suitable or feasible for use upon main line electrified sections of a steam railroad.

The photograph you show me, Exhibit L, is a correct representation of an electric locomotive of the Chicago, Milwaukee and St. Paul Railroad. The weight of that locomotive is 310 tons. Normally it hauls the trans continental trains of the C. M. and S. P. up a 2 per cent grade at 20 miles an hour and it requires about an hour to mount that grade; its axle loading on the driving axle is 70,000 pounds; it has hour horsepower rating of 4,680 horsepower and its continuous rating is 3,400 horsepower; this is as against 740 one hour rating for the P. and N. locomotives. That locomotive would not be feasible or suitable for operation on an electric railroad like the P. and N. The voltage of that locomotive is 3,000 volts direct current; the P. and N. uses 1,500 volts direct.

The photograph you show me, defendant's Exhibit M, is a correct representation of the electric locomotive (376) of the Great Northern Railroad. Each unit of that locomotive, that is, one-half of it, weighs 184 tons; its tonnage rating on a 1 per cent grade is about 4,000 tons; its axle loading is 70,700 pounds; its horsepower rating is 2,165 hourly and 1,830 continuous. That locomotive would not be suitable or feasible for use on an electric railroad like the P. and N.

The photograph you show me, defendant's Exhibit N, is a correct representation of an electric locomotive of the Norfolk and Western Railway. Where alternating current motors are used, the voltage runs a great deal higher. It gives the possibility of much higher voltage on the line and much lower line losses and greater distances to which it can be transmitted.

That voltage is lowered by a transformer and it is utilized at a much lower voltage. The reason for using higher voltage alternating current is to have long distances between substations and lower line losses. The weight of the Norfolk and Western locomotive for each unit is practically the same as those of the Virginian and the rating of this complete locomotive would be just two-thirds of that of the Virginian; the actual weight is 414,000 pounds, the weight per driving axle, 74,500 pounds. The rating is the same, each unit; the horsepower rating is exactly the same per unit as the Virginian, that is, the total locomotive has two-thirds. This has two cabs where the Virginian has three. The

P. and N. electric locomotive would not be suitable or feasible for use upon the main line electrified sections of steam railroads. The P. and N.'s voltage is 1,500 direct. Where the direct voltage is used on main line elec-
(377) trified sections of steam railroads for trunk lines, nothing less than 3,000 volts is used. Where alternating current is used the usual voltage is 11,000 or a little over.

You ask what determines the character of voltage to be used on an electric railroad; it is really the concentration of power and the frequency of service; the loss with a low voltage becomes very great when considerable amounts of power are handled, and it requires enormous expenditures for copper feeder lines, and a great many substations, to handle a load sufficient for a concentrated train loading such as is used on main lines. In the case of an electric railway where the traffic is moved in rather small units and at frequent intervals, the lower voltage of 1,500 D. C. is the suitable and feasible voltage to use; on the other hand, in the case of an electrified railroad where the traffic is heavy, moving less frequently, as on a main line electrified section of a steam railroad, a higher voltage of 3,000 D. C. or 11,000 A. C. is the suitable and feasible voltage to use. There are a good many things that enter into it, but the fact is, there is no steam railroad in the country to my knowledge that would consider the use of 1,500 volts direct current on a main line electrification, and I know of no consulting engineer who would recommend it, nor any manufacturing company.

The only complete locomotives we furnished the P. and N. were the ones in 1911 and 1912, the first order. We have furnished electrical equipment for some of these eight-axle locomotives. Those are strictly home made products, just such as many of the electric lines operating between towns and through towns built before they
(378) bought real locomotives. They took the passenger car equipment and fitted it up on a flat car, took electrical equipment and mounted it on a flat car and handled freight. Now, in this case the Piedmont and Northern took two of their box motor cars which were sold originally to handle express matter,—took the trucks and motors right out from under them; and built them into a single framework with one of these box motor cabs on

top of it. That is strictly a home made product, and answers the purpose very well up to the very limited capacity of the motor.

The picture you show me, Exhibit O, is a correct representation of the overhead electrical equipment of the Piedmont and Northern; that is what is called "catenary construction". The construction follows the practice of using the catenary construction which had been introduced on the Indianapolis and Cincinnati Traction line about 1905; that line was a line running from Indianapolis South to Rushville and to Greenburg and to Connellsville.

The overhead construction and equipment shown on defendant's Exhibit O, representing the overhead construction and equipment of the Piedmont and Northern, is similar to that in common use prior to 1920 on electric railways, commonly known as the good class of interurban electric railways; I think the first catenary line was built in 1905; after that I think practically all of these lines have the catenary construction, which is more substantial. That kind of overhead construction would differ radically from that used on main line sections of steam railroads. There are steam railways that have been electrified that use wooden poles, for instance, the (379) Chicago, Milwaukee and St. Paul; they are in the mountains in the West where wooden poles are very cheap and they last a long time there, but in the East steel construction set in concrete is universally used and it requires a very much higher grade of insulation and it would have to be insulated for the higher voltages.

The photograph you show me, Exhibit P, I think, correctly represents the overhead construction and equipment of the Pennsylvania Railroad; this is on the main line West from Philadelphia. That is electrified with 11,000 volts alternating current.

The photograph you show me, Exhibit Q, correctly shows the overhead electric equipment of the New Haven main line. In a general way, I am familiar with the electric locomotives of the New York Central, although I have had nothing to do with their design. The New York Central has an electrified zone around New York City; it is comparatively a short electrification with very heavy and dense traffic in the Grand Central Station and it is electrified with 600 volts and a third rail; they

handle all the passenger traffic that comes into New York City; I don't know how much freight they handle on that line. I know they have some yards there and use some rather light locomotives for switching and transfer service, 100-ton locomotives; they are classed as transfer and switching locomotives. The third rail I referred to is a conductor consisting of a heavy rail, a running rail, only in this case it is shaped more like an hour glass, which is elevated on one side of the running rail; there are heavy contact shoes on the locomotive or car that makes contact with that rail; it is neces-
(380) sary on account of the extremely heavy currents that are required on that low voltage; they use overhead in a very few places in the yard where it is impossible to have this third rail, but in that case it is an overhead rail rather than a wire; a wire could not carry enough current for it. That third rail construction is not used in main line operation, but only in congested areas. The desire is to use low voltage and high current; that line was built at a time when the single phase alternating current system had not been fully developed, and the New York Central Commission thought it was advisable to go ahead with something that had been tested out; that 600-volt third rail system was put in the Baltimore Tunnel, the B. and O. Tunnel, about 1895, but it has never been extended and has never been considered suitable at all for main line work.

Cross Examination.

It is a fact that I and other electrical engineers design electrical apparatus to fit the conditions and situations of their proposed use as submitted to us by prospective purchasers. The great variety of types, voltages, powers, weights, etc.; of electric propulsion which I have referred to are partly due to varying conditions and partly to individual desires and ideas of different railroads; a great deal depends on that. In designing a piece of electrical apparatus, such as an electrical locomotive, we make a careful investigation to see that the apparatus will suit the condition. The tonnage of locomotives as I have referred to it refers to the load that is pulled back of the drawbar. You ask that if in figuring tonnage the number of average carloads is consid-

ered; the average weight per car is something that va-
(381) ries with the service; if it is general merchandise it is one thing, coal or iron ore, it is something vastly different. It makes quite a difference in the train resistance as we call it. With a 2,000-ton locomotive operating on a track with a maximum grade of 1 per cent and maximum curvature of 6 per cent. I don't know that I can say what number of loaded coal cars that locomotive could draw; there are different weights of coal cars; I don't figure particularly on the number of cars; there are cars that weigh 70 tons and cars that weigh, maybe, 90 tons or more; some of the Virginian and Norfolk and Western cars are 6-axle; I am not familiar with the exact weight of these. In these tonnage ratings I did not consider the compensation tonnage which a steam railway uses; I considered simply the actual friction at a certain value and the grade resistance; that was all that it was translated into; I do not mean to say that that was exactly the tonnage that a railway would give it. I gave the load which a locomotive could pull at its normal drawbar pull, the tractive effort. The tractive effort of a locomotive is the turning movement that you get at the wheel; you must take from that whatever the locomotive itself requires before it gets to the drawbar, and the grade, of course, is a necessary factor. If if is on a grade you must take enough more to elevate that locomotive up the grade so that the drawbar pull on any locomotive is less on a grade than on a level, modified by the effort to lift the locomotive up the grade.

I believe that the treble unit Virginian Railway locomotive, shown on Exhibit J, is the most powerful electric locomotive in the world, as far as I know. The Westinghouse Company has built larger electric locomotives
(382) for the Pennsylvania Railroad than the one shown on Exhibit K. The one we are building for the Pennsylvania now would compare approximately to the big Pacific Type of steam locomotive. You ask if the Pennsylvania has quite a variety of electric locomotives on its line, large ones and very much smaller ones; they don't go down to small ones; they have one locomotive in service which has only two pairs of drivers, but each pair has a horsepower motive capacity of about 1,200 on each axle, the two of them 2,400 horsepower, and, of course, they would build the same type, except for three

of these axles, making 3,600 horsepower. The Pennsylvania Railroad is a very large carrier of freight and passenger traffic; it is rated as the fastest in the world, according to what you see in the press; they probably advertise themselves as hauling more freight and passengers than any other railroad in the United States. In a general way I am familiar with the Malet Type of steam locomotive; it is a very large and heavy steam locomotive and is particularly adapted to excessively heavy traffic. I know there are many steam roads in the country, parts of the Southern Railway for instance, over which it would be out of the question to operate a Malet locomotive. Probably if you would put a Malet locomotive on the Southern Railway from Greenville to Greenwood, it would be very serious; it would be pretty heavy, there is no question about that, on only an 80-pound rail.

The electric locomotive of the Great Northern Railway, shown on Exhibit M, is about the largest electric locomotive used by that road. It is two units together. Exhibit N shows an electric locomotive of the Norfolk (383) and Western, and it is the largest and heaviest type of electric locomotive used on that road; they are used on main line haulage on that grade.

In deciding as to what is the proper type weight and power of locomotives, whether steam or electric, to use on a particular line of railroad, the information generally comes about this way, as we get it; We want to pull trains weighing so much over our road, making certain schecule speed, or maybe to begin with, the steam railroad man figures chiefly on the axle loading, or on the weight of the drivers; he has got so many tons weight on drivers, but thinks he has a locomotive; that is only one item; taking the steam locomotive, he has got to have boiler capacity to suit the speed and tractive effort which he wants. With the electric, he must have the motors designed to operate at the speed that he wants. He may have a certain weight designed for ten miles an hour; it makes a vast difference in the equipment. a nhour; it makes a vast difference in the equipment. A great many elements enter into that decision, sometimes including questions of taste by the particular railroad man; they might like the looks of one type better than another. From the standpoint of a locomotive

designing engineer, we design in any particular case, a locomotive adequate to perform the particular job which it will be called on to perform.

I designed at least a part of the electric locomotives for the Piedmont and Northern; the Westinghouse Manufacturing Company and the Baldwin Locomotive Company manufactured the mechanical parts; these two companies are leading companies in their line. These locomotives meet the specifications for their purpose.

RE-DIRECT EXAMINATION.

(384) The electric locomotives in use generally on electrified sections of steam railroads in the United States are very much heavier locomotives than those in use on the P. and N., and for a very good reason. The steam railway will ask for a locomotive having about the heaviest axle-loading which their tracks can stand; the P. and N. has a locomotive with the small motors which are just what are used on these little roads running through the country, or on cars. They have not a motor on the road that is any larger than many that are used on these passenger cars; not necessarily interurban cars, or any of that classification, but subways and such things. The equipment of the P. and N. locomotive, their trucks, are the same size as passenger type trucks; their maintenance cost is reduced by having interchangeable equipment and they can work much better.

(385) E. B. HARDIN, a witness for the defendant, testified:

I live at Charlotte, N. C.; am auditor of the Piedmont and Northern Railway, and have charge of its books, records and accounts. The statement, defendant's Exhibit R, correctly shows the freight and passenger revenue and the ratio of passenger revenue to freight revenue for the Piedmont and Northern Railroad from April 3, 1912, to June 30, 1930.

It shows that for the year ending June 30, 1912, the freight revenue of the Piedmont Traction Company (predecessor of the Piedmont and Northern) was $5,283.31, the passenger revenue $14,117.85, and the ratio of passenger to freight revenue 267.21%. For the year

ending June 30, 1913, the freight revenue of the Piedmont Traction Company, and the Greenville, Spartanburg and Anderson Railway Company (the predecessor of the Piedmont and Northern) was $193,113.84, the passenger revenue $201,700.85, and the ratio of passenger to freight revenue 104.44%. For the year ending June 30, 1914, the freight revenue of the above mentioned two roads, the predecessors of the Piedmont and Northern, was $496,772.39, the passenger revenue $324,045.21, and the ratio of passenger to freight revenue 65.21%; for the year ending June 30, 1915, the freight revenue of the Piedmont and Northern was $549,426.00, the passenger revenue $336,466.66, and the ratio 61.23%; for the period from July 1st, 1915, to December 31st, 1915, freight revenue, $324,643.72, passenger revenue $189,757.22, and the ratio, 58.45%; for the years ending December 31, 1916 to 1929, inclusive, and for the period January 1, to June 30, 1930, the respective freight revenues, passenger revenues, and ratios were as follows:

(386)

| Year | Freight Revenue | Passenger Revenue | Ratio of Pass. Rev. to Frt. Rev. |
|---|---|---|---|
| 1916 | $ 742,668.68 | $397,366.77 | 53.50% |
| 1917 | 862,414.65 | 555,430.04 | 64.40% |
| 1918 | 727,913.17 | 871,755.17 | 119.76% |
| 1919 | 653,660.59 | 619,305.88 | 94.74% |
| 1920 | 1,026,734.58 | 678,269.96 | 66.06% |
| 1921 | 1,215,512.20 | 464,071.52 | 38.17% |
| 1922 | 1,426,806.17 | 426,981.10 | 29.92% |
| 1923 | 1,887,610.60 | 390,282.11 | 20.67% |
| 1924 | 1,835,905.32 | 276,846.13 | 15.07% |
| 1925 | 2,172,288.41 | 178,689.38 | 8.22% |
| 1926 | 2,288,091.98 | 138,539.68 | 6.05% |
| 1927 | 2,340,809.58 | 124,154.28 | 5.30% |
| 1928 | 2,185,110.36 | 108,279.18 | 4.95% |
| 1929 | 2,317,528.77 | 71,562.72 | 3.08% |
| ending 6-30-30 | 1,024,737.42 | 18,482.95 | 1.80% |

Exhibit S is a statement entitled "Piedmont and Northern Railway Company, Passenger Train Operation —Calendar Years—1914 to 1929 inclusive", and is a correct statement from the books of the company. This statement shows the number of passenger train miles,

number of passenger trains, average passenger trains daily, number of cars in trains, average cars per passenger train, number of passengers handled, and average number of passengers per train, which for each of said years were as follows:

| | | |
|---|---|---|
| Passenger Train Miles: | 1914 | 759,560 |
| | 1915 | 669,948 |
| | 1916 | 719,025 |
| | 1917 | 717,413 |
| | 1918 | 796,427 |
| | 1919 | 623,651 |
| | 1920 | 596,544 |
| | 1921 | 514,639 |
| (387) | 1922 | 503,288 |
| | 1923 | 511,553 |
| | 1924 | 476,699 |
| | 1925 | 412,502 |
| | 1926 | 369,526 |
| | 1927 | 397,128 |
| | 1928 | 402,361 |
| | 1929 | 271,545 |
| No. Passenger Trains: | 1914 | 21,451 |
| | 1915 | 18,722 |
| | 1916 | 26,289 |
| | 1917 | 31,740 |
| | 1918 | 44,182 |
| | 1919 | 28,626 |
| | 1920 | 29,818 |
| | 1921 | 25,178 |
| | 1922 | 21,776 |
| | 1923 | 22,003 |
| | 1924 | 20,322 |
| | 1925 | 15,966 |
| | 1926 | 14,612 |
| | 1927 | 15,282 |
| | 1928 | 15,732 |
| | 1929 | 10,570 |

| | | |
|---|---|---|
| Average Passenger Trains Daily: | 1914 | 58.77 |
| | 1915 | 51.29 |
| | 1916 | 71.83 |
| | 1917 | 86.96 |
| | 1918 | 121.05 |
| | 1919 | 78.43 |
| | 1920 | 81.46 |
| | 1921 | 68.98 |
| | 1922 | 59.66 |
| | 1923 | 60.27 |
| | 1924 | 55.52 |
| | 1925 | 43.62 |
| | 1926 | 40.03 |
| | 1927 | 41.87 |
| | 1928 | 42.98 |
| | 1929 | 28.96 |
| No. Cars in Trains: | 1914 | 30,866 |
| | 1915 | 26,607 |
| | 1916 | 34,195 |
| | 1917 | 52,250 |
| | 1918 | 90,595 |
| | 1919 | 41,731 |
| | 1920 | 48,040 |
| | 1921 | 38,760 |
| | 1922 | 32,984 |
| | 1923 | 33,492 |
| | 1924 | 28,923 |
| | 1925 | 20,965 |
| | 1926 | 18,274 |
| (388) | 1927 | 19,180 |
| | 1928 | 18,691 |
| | 1929 | 13,126 |
| Average Cars per Passenger Train: | 1914 | 1.44 |
| | 1915 | 1.42 |
| | 1916 | 1.30 |
| | 1917 | 1.65 |
| | 1918 | 2.05 |
| | 1919 | 1.46 |
| | 1920 | 1.61 |
| | 1921 | 1.54 |
| | 1922 | 1.51 |
| | 1923 | 1.52 |

| | | |
|---|---|---|
| | 1924 | 1.42 |
| | 1925 | 1.31 |
| | 1926 | 1.25 |
| | 1927 | 1.25 |
| | 1928 | 1.19 |
| | 1929 | 1.24 |
| No. Passengers handled: | 1914 | 1,124,187 |
| | 1915 | 1,062,460 |
| | 1916 | 1,253,180 |
| | 1917 | 2,045,896 |
| | 1918 | 3,302,794 |
| | 1919 | 1,494,760 |
| | 1920 | 1,537,212 |
| | 1921 | 895,591 |
| | 1922 | 775,657 |
| | 1923 | 727,875 |
| | 1924 | 529,055 |
| | 1925 | 336,997 |
| | 1926 | 252,607 |
| | 1927 | 233,379 |
| | 1928 | 215,515 |
| | 1929 | 151,342 |
| Average No. Passengers per Train: | 1914 | 52 |
| | 1915 | 57 |
| | 1916 | 48 |
| | 1917 | 64 |
| | 1918 | 75 |
| | 1919 | 52 |
| | 1920 | 52 |
| | 1921 | 36 |
| | 1922 | 36 |
| | 1923 | 33 |
| | 1924 | 26 |
| | 1925 | 21 |
| | 1926 | 17 |
| | 1927 | 15 |
| | 1928 | 14 |
| | 1929 | 14 |

(389) Exhibit T is a statement of passenger revenue from April 3, 1912, to June 30, 1930, separated as to the interstate and intrastate revenue from January,

1919, to June 30, 1930. Information was not available for separating passenger revenue between interstate and intrastate prior to January, 1919; the statement shows that practically all the passenger revenue comes from intrastate passenger travel; for the first six months of 1930, 28/100 of 1 per cent was from interstate passenger traffic. The statement shows that from 1919 to June 30, 1930, the percentage of revenue from interstate traffic was from 33/100 of 1 per cent in 1919, to 28/100 of 1 per cent in 1930, and the percentage of revenue from intrastate traffic was from 99.67 per cent in 1919, to 99.72 per cent in 1930.

Exhibit U is statement of freight revenue of the Piedmont and Northern Railway from April 3, 1912, to June 30, 1930, separated between interstate and intrastate from January, 1919, to June 30, 1930. No separation of interstate and intrastate was made prior to January, 1919, as information was not available to make such separation. The respective percentages of interstate and intrastate freight revenues for the years 1919 to June 30, 1930, are as follows:

| Year | Inter-state Percent | Intra-state Percent |
|---|---|---|
| 1919 | 68.17 | 31.83 |
| 1920 | 75.07 | 24.93 |
| 1921 | 82.84 | 17.16 |
| 1922 | 79.22 | 20.78 |
| 1923 | 80.88 | 19.12 |
| 1924 | 83.81 | 16.19 |
| 1925 | 92.00 | 8.00 |
| (390) 1926 | 90.44 | 9.56 |
| 1927 | 88.96 | 11.04 |
| 1928 | 82.13 | 17.87 |
| 1929 | 80.66 | 19.34 |
| 1930— six months | 79.07 | 20.93 |
| Average Ratio | 83.65 | 16.35 |

Exhibit W is statement of cars handled by commodities for the years 1921 to 1929, as follows:

| Year | Grain & Grain Prods. No. Cars | Packing House Products— No. Cars | Fruits & Vegetables No. Cars | Coal & Coke No. Cars |
|---|---|---|---|---|
| 1921 | 1,462 | 966 | 578 | 4,308 |
| 1922 | 1,760 | 1,048 | 819 | 4,522 |
| 1923 | 2,097 | 1,207 | 1,053 | 8,964 |
| 1924 | 2,174 | 1,141 | 1,345 | 7,545 |
| 1925 | 2,600 | 1,069 | 1,264 | 12,784 |
| 1926 | 2,805 | 1,047 | 1,023 | 12,778 |
| 1927 | 2,204 | 1,059 | 1,484 | 11,448 |
| 1928 | 2,432 | 1,305 | 1,909 | 6,367 |
| 1929 | 2,374 | 1,636 | 2,014 | 6,920 |

| | Building Materials No. Cars | Cotton & Waste— No. Cars | Cotton Factory Prods. No. Cars | Sand & Stone No. Cars |
|---|---|---|---|---|
| 1921 | 1,995 | 4,430 | 6,087 | 1,578 |
| 1922 | 4,774 | 4,387 | 6,288 | 2,325 |
| 1923 | 7,891 | 5,422 | 6,547 | 3,316 |
| 1924 | 6,039 | 6,157 | 7,153 | 2,563 |
| 1925 | 6,315 | 8,868 | 9,317 | 2,378 |
| 1926 | 4,489 | 9,549 | 10,310 | 3,153 |
| 1927 | 4,160 | 11,707 | 11,699 | 3,634 |
| 1928 | 4,221 | 9,327 | 11,914 | 3,858 |
| 1929 | 3,369 | 10,606 | 13,291 | 3,063 |

| | Merchandise No. Cars | Automobiles No. Cars | Gasoline & Oils No. Cars | Fertz. & Fertz. Mas. No. Cars |
|---|---|---|---|---|
| 1921 | 9,907 | 898 | | 853 |
| 1922 | 9,653 | 1,340 | | 829 |
| 1923 | 10,247 | 2,809 | 1,601 | 1,061 |
| 1924 | 11,119 | 2,726 | 1,917 | 1,313 |
| 1925 | 12,365 | 2,866 | 2,318 | 1,526 |
| 1926 | 14,345 | 2,948 | 2,653 | 1,242 |
| 1927 | 15,244 | 2,971 | 2,804 | 904 |
| 1928 | 15,786 | 2,790 | 3,260 | 1,034 |
| 1929 | 16,847 | 2,234 | 3,854 | 1,230 |

(391)

| Year | Machinery No. Cars | Miscellaneous No. Cars |
|---|---|---|
| 1921 | 413 | 6,697 |
| 1922 | 705 | 5,194 |
| 1923 | 1,276 | 3,564 |
| 1924 | 1,341 | 3,074 |
| 1925 | 527 | 3,158 |
| 1926 | 606 | 5,938 |
| 1927 | 759 | 7,411 |
| 1928 | 1,028 | 8,489 |
| 1929 | 988 | 9,011 |

The statement shows the following total number of cars of each of said commodities handled during the nine-year period, 1921 to 1929, inclusive:

| *Commodity* | *Total No. Cars* | |
|---|---|---|
| Grain & Grain Products | 19,908 | |
| Packing House Products | 10,478 | |
| Fruits & Vegetables | 11,489 | |
| Coal and Coke | 75,636 | |
| Building Materials | 43,253 | |
| Cotton and Waste | 70,453 | |
| Cotton Factory Products | 82,606 | |
| Sand and Stone | 25,868 | |
| Merchandise | 115,513 | |
| Automobiles | 21,582 | |
| Gasoline & Oils | 18,407 | |
| Fertilizer & Fertz. Mats. | 9,992 | |
| Machinery | 7,643 | |
| Miscellaneous | 52,536 | 565,364 |

Exhibit X is the statement of classified tonnage for the years 1925 to 1929, inclusive, showing the total tonnage, overhead tonnage and less than carload tonnage, as follows:

(392)

| Year | Total Tonnage including Overhead & LCL. | Overhead Tonnage | L. C. L. Tonnage | Percent LCL Tonnage of Total |
|---|---|---|---|---|
| 1925 | 1,441,365 | 63,365 | 105,413 | 7.31 |
| 1926 | 1,527,509 | 51,737 | 121,140 | 7.93 |
| 1927 | 1,514,952 | 58,584 | 134,569 | 8.88 |
| 1928 | 1,293,582 | 69,586 | 123,495 | 9.54 |
| 1929 | 1,295,554 | 86,409 | 133,740 | 10.32 |

Exhibit Y is statement of carload and less than carload tonnage handled for the calendar years 1928 and 1929, and for the first two months of 1930. This statement shows that in 1928 the L. C. L. tonnage was 9.54 per cent of the total tonnage carried; in 1929, 10.32 per cent; and for the two months of 1930, 10.67 per cent. This Exhibit corresponds with the plaintiff's Exhibit No. 70, introduced by the Interstate Commerce Commission, except that the textile traffic has been separated as between carload and less than carload shipments; in every other respect the two statements are the same.

Exhibit Z is statement of freight train miles, number of tons handled one mile, average number of freight cars in each freight train for the period from 1921 to 1929, inclusive, and the first six months of 1930, and is as follows:

| Year | Freight Train Miles | Number of Tons Hauled One Mile (Net) | Average Number of Freight Cars in Each Freight Train | | |
|---|---|---|---|---|---|
| | | | Loads | Empties | Total |
| 1921 | 119,767 | 19,115,137 | 10.5 | 4.0 | 14.5 |
| 1922 | 148,824 | 25,538,510 | 9.7 | 3.6 | 13.3 |
| 1923 | 163,299 | 36,193,932 | 11.0 | 4.6 | 15.6 |
| 1924 | 165,976 | 34,618,511 | 11.2 | 5.4 | 16.6 |
| 1925 | 176,332 | 43,093,464 | 12.8 | 5.8 | 18.6 |
| (393) | | | | | |
| 1926 | 173,955 | 43,326,142 | 13.6 | 6.2 | 19.8 |
| 1927 | 172,148 | 47,049,950 | 15.1 | 7.0 | 22.1 |
| 1928 | 171,944 | 39,921,781 | 14.1 | 6.4 | 20.5 |
| 1929 | 186,085 | 42,663,142 | 14.8 | 6.5 | 21.3 |
| 1930 (1st 6 Mos.) | 99,900 | 21,014,332 | 13.8 | 6.0 | 19.8 |

Exhibit A-1 is statement of passenger, freight and work equipment purchased by the Piedmont and Northern Railway and its predecessors up to and including June 30, 1914. It shows that the Piedmont and Northern *to June 30, 1914*, spent $395,003.66, or 51.95 per cent of its total expenditure on equipment for trailers, motor cars, box motors, and street cars, all of which are passenger equipment; that it spent for locomotives, box cars, flat cars and cabooses, all of which are freight equipment, $317,192.91, or 41.71 per cent of the total expenditures; $4,700 or 64/100 per cent of such expenditure for construction, and $43,396.98 or 5.7 per cent for work equipment, including camp cars, ditcher, bonding machine and ballast cars. The statement indicates that more was spent on passenger equipment than on freight equipment.

The Piedmont and Northern Railway Company is engaged in carrying the U. S. mail. Exhibit B-1 is order of the Post Office Department, dated November 24, 1920, and is the order under which the Piedmont and Northern carries U. S. mail. This order is headed: "Post Office Department, Division of Railway Adjustments, Electric Car Service." It authorizes the carrying of mail by the Piedmont and Northern Railway Company "subject to further orders and in accordance with the Order of the Interstate Commerce Commission of August 7, 1920, No. 10,227 (Electric Railway Mail Pay) the postal laws and (394) regulations and the customs and practices in relation to electric car mail service."

Exhibit C-1 is a circular letter from the Post Office Department, dated December 13, 1922, signed by Paul Henderson, Second Assistant Postmaster General. The Piedmont and Northern Railway Company received that circular. It is headed "Circular Letter RA-510 All urban and interurban electric railway common carriers". The Court admitted this evidence subject to the condition that it could not be considered as an adjudication of the character of the defendant, and that so far as the Court was concerned "all urban and interurban electric common carriers" might as well not be on the circular. The Circular reads in part: "The following instructions and rulings are issued for the guidance of all Urban and Interurban Electric Railway Common Carriers subject to the provisions of the Act of Congress, approved July

2, 1918, 40 Stat., 742,748." Then follows the rulings and instructions referred to.

The Piedmont and Northern Railway Company has complied with the rulings and instructions contained in Exhibit C-1 in handling the mail, and is paid for handling it in accordance with the rates set forth therein.

Exhibit D-1 is copy of letter of September 22, 1928, written by the Piedmont and Northern to the Division of Railway Adjustments, Post Office Department, as follows: "I have not yet received notice of increase in Railway mail pay in connection with the Interstate Commerce Commission's Order No. 9200. It is my understanding that this increase applies to electric as well as steam railroads."

(393) I received in reply to the foregoing letter a letter dated September 25, 1928, which is the defendant's Exhibit E-1. This letter reads: "I have your letter of September 22, File 165. The Order of the Interstate Commerce Commission of June 10, 1928, authorizing increases in mail pay rates, applies only to railway common carriers, and does not include electric car common carriers." This letter is from the office of the Second Assistant Postmaster General, Post Office Department, Division of Railway Adjustments, and is signed by W. E. Turin, Superintendent.

Bond Anderson was Auditor of the Piedmont and Northern Railway Company in 1920. Defendant's Exhibit G-1 are three letters, which passed between Mr. Anderson and officials of the Interstate Commerce Commission, in respect of the interurban status of the Piedmont and Northern, as follows:

Oct. 12, 1920.

Mr. Bond Anderson, Auditor,
Piedmont and Northern Railway Company,
Charlotte, N. C.

Dear Sir:

Referring to your letters of July 30, 1920, and September 3, 1920, file 256, asking for an interpretation of various sections of the Transportation Act, 1920:

E. B. HARDIN,

You state in your letters that the Piedmont and Northern Railway Company is engaged in the general transportation of passenger and freight traffic and that it is not affiliated with a steam railroad system nor a part of such a system.

With this understanding you are advised that it is the informal view of the Commission that section 422, reading as follows:

Section 422—15a: "When used in this section the term 'rates' means rates, fares and charges, and all classifications, regulations and practices relating thereto; the term 'carrier' means a carrier by railroad or partly by railroad and partly by water, within the Continental United States, subject to this act, excluding (a) (396) sleeping-car companies and express companies, (b) street or suburban electric railways unless operated as a part of a general steam railroad system or transportation, (c) interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight," etc.

is applicable to your line, and that section 439, reading as follows:

Section 439—20a (1): "That as used in this section the term 'carrier' means a common carrier by railroad (except a street, suburban or interurban electric railway which is not opeated as a part of a general steam railroad system of transportation) which is subject to this act, or any corporation organized for the purpose of engaging in transportation by railroad subject to this act."

is not applicable to your line.

In regard to section 300, it is suggested that you take this matter up with Mr. C. P. Carrithers, Secretary of the Labor Board, Kesner Building, Chicago, Ill.

Respectfully,

Signed: G. B. McGINTY, Secy.

Charlotte, N. C.,
October 28, 1920.

File 256

Mr. George B. McGinty, Sec'y.;
Interstate Commerce Commission,
Washington, D. C.

Dear Sir:

I am in receipt of the Commission's circular letter of June 26th, revised September 22, 1930, in respect to application under Section 20A of the Interstate Commerce Act as inserted by Section 429 of the Transportation Act 1920 for authority to issue securities, etc.

I take it, in view of your letter to me of the 12th inst., File 511179, that this circular letter is not applicable to the P. & N. Railway Company and there is, therefore, no response to be made to your special report series Circular #29.

Yours very truly,

Signed: BOND ANDERSON,
Auditor.

(397) November 22, 1920.

Special Report Series, Circular No. 29.

Mr. Bond Anderson, Auditor,
Piedmont and Northern Railway Company,
Charlotte, N. C.

Dear Sir:—

Receipt is acknowledged of your letter of October 28, 1920, file No. 256. In view of the fact that the Piedmont and Northern Railway Company is an electric interurban railway not operated as a part of a general steam railroad system of transportation, you are advised that it is not necessary for you to file returns to our Special Report Series, Circular No. 29.

You are requested to return the blank forms of this Circular now in your possession.

Yours very truly,

Signed: W. A. COLSTON,
Director.

Since 1914 the Piedmont and Northern Railway has made reports of its operations and finances to the Interstate Commerce Commission in accordance with "Annual Report Form G (Electric Railways)", sent out by the Commission to be used by electric railways.

(RE-CROSS EXAMINATION.)

By ATTORNEY FOR THE COMMISSION:

In my opinion the increase in passenger revenue of the Piedmont and Northern for the years 1917 to 1919 was due to the location of some army camps on our lines. Referring to Exhibit 66, and to Defendant's Exhibit R, the passenger and freight revenue is in agreement on both exhibits; there is a difference in the stated ratios in the two exhibits, based upon a slight difference in the basis on which I have figured the ratios from those figured by Mr. Marsh, the witness for the Commission. I figured the ratio of passenger revenue to freight reve-
(398) nue and apparently he has figured it on a percentage of the total. Outside of that difference, and also the fact that my statement extends over a longer period than that covered by the Commission's Exhibit, the two statements are in accord.

I cannot explain the reason for the decrease in freight revenues of the Piedmont and Northern for the period of the War. The Government took over the Piedmont and Northern on January 1, 1918; I don't know whether that had anything to do with the cessation of freight which was formerly handled by the Piedmont and Northern and its diversion over other lines or not. The increase in the passenger traffic during the period of the War is shown on our Exhibit S.

The Commission's Exhibit 68, which is statement of intrastate and interstate revenues, both passenger and freight, corresponds with the defendant's Exhibits in

reference to the same matter, except that the latter cover a greater period of time. The defendant's Exhibit V, statement showing freight revenue separated as between local, interline and overhead, corresponds with the Commission's Exhibit 67, except that in our exhibit, overhead, which is interline revenue, is separated. while in the Commission's exhibit overhead is included in the interline revenue.

Our Exhibit W, statement of cars handled by commodities, as compared with the plaintiff's Exhibit 72, shows that the two agree, except that Exhibit 72 shows three months of 1930; aside from that difference in period covered, the data is in accord.

You show me Exhibit 60, which purports to be an order of the Interstate Commerce Commission, dated May 25, 1920, addressed to all carriers subject to the (399) Interstate Commerce Act. I have no recollection of having seen such a paper in the files of the Piedmont and Northern Railway. I don't know whether the Piedmont and Northern Railway ever made any reply or response to the Commission in compliance with the statements contained in this paper or not.

RE-DIRECT EXAMINATION.

The Piedmont and Northern Railway was taken into Federal control for a part of the period during which Federal control existed. E. H. Copeland was the representative of the Railroad Administration during Federal Control, and had supervision of the Piedmont and Northern Railway Company along with the Southern Railway Company. Before Federal control, for a great many years Mr. Copeland had been Vice President and an official of the Southern Railway Company.

RE-CROSS.

None of the figures in our exhibits and statements as to passenger and freight revenue include items of passenger train revenue such as express, mail, baggage or switching. The figures I show are freight revenue and passenger revenue, omitting items of express, mail, baggage and switching. The Railway Express Agency operates over our line. We do not handle any cars for

the Railway Express Agency. We used to get through express cars at Greenwood and bring them through Greenville and Spartanburg; that revenue is shown under the head of "Express Revenue". It will average approximately $45,000 a year. This revenue is shown on the Commission's Exhibit 66.

(400). F. M. CARHART, a witness for defendant, testified:

I live at Wellesley Hills, Massachusetts; am a consulting engineer located at Boston; graduated from Massachusetts Institute of Technology in 1905; have followed the practice of engineering since then; in the past 12 years have been familiar with the electric railway industry; have made considerable study of values, methods of operation of electric railways, and my business has required me to be familiar with the electric railway industry in general; am a member of the firm of Jackson and Moreladn, whose business has had to do mainly with public utilities, electrification of steam railways, electrical and mechanical operation of industries, and in connection with that business we design and supervise the construction of such projects as I have named and study their operations and developments. We have done and still do a great deal of work for the New York Edison Company, New England Power Association, The Edison Electric Illuminating Company of Boston, Philadlphia Electric Company, and other such companies. We were engineers for the Great Northern in the electrification of its Cascade Division, and are the engineers for the Deleware, Lackawanna and Western in the electrification which is now in progress and which has recently in part been put into operation, which is about 160 miles of main line track; this is gradually going into operation from day to day, and we expect it all to be in operation by the first of the year.

In my business it has been necessary for me to make a study of electric railways, particularly those commonly known as interurban electric railways and street railways and I have been familiar with them in general for (401) 12 years past; also in connection with the electrification development of steam railways, I have made extended study of the operation of steam railroads. I

am a member of the American Institute of Electrical Engineers; member of the American Society of Mechanical Engineers, of the American Society of Civil Engineers, and Boston Society of Civil Engineers.

I have been more or less familiar with the Piedmont and Northern Railway for the past four or five years and have recently made an inspection in some detail of it; have gone over the main line track of both divisions; inspected its shops at Pinoca and River Junction; inspected the substations of the Northern Division and given considerable study to data in relation to equipment and capacities of substations on the Southern Division. The River Junction shop is near Greenville, and Pinoca is two or three miles from Charlotte. The Piedmont and Northern has two divisions, the Northern or North Carolina, from Charlotte to Gastonia main line, with trackage rights over the street railways in Charlotte and Gastonia; the Southern Division extends from Spartanburg through Greenville to Belton and Greenwood; there is a branch line from Belmont Junction over to Belmont on the North Carolina Division. The Southern Division has trackage rights over street railway in Greenville and Anderson, in the latter place there being a branch line from Belton. The main line of the Northern Division extends generally at almost right angles to the natural drainage of the country, for which reason there are rather extensive cuts and fills in the line to keep the grades at a reasonable minimum; however, the construction was not extraordinarily expensive as the material was light earth, with little if (402) any solid rock and the same statement generally applies to the South Carolina Division; on the North Carolina Division the maximum grade is 1 per cent, except on Graham Street entering Charlotte and coming up to Graham Street there is a grade of about 5.6 per cent; on Mint Street it is 3½ per cent. On Franklin Avenue in Gastonia, slightly over 4 per cent. On the main line of the South Carolina Division the grade is approximately 1 per cent; on the Anderson Branch, 2½ per cent; on the North Carolina Division, the maximum curvature is 10 degrees and on the South Carolina, 6 degrees. Oak ties are used between the cities. The 10 degree curvature on the North Carolina Division is between the substation coming into Gastonia and Franklin

Avenue, or a mile or two from Gastonia, as I remember; it is on the line between the cities and not on any line in the cities. Of course, there are some curves of greater degree heretofore testified to; the Y in Greenwood is a 48 degree curve. The type of frog is a rigid frog, generally a Number 9 frog. The ballast is cinder in the main; some of it looks as though it were gravel or broken stone mixed with cinders. The voltage between the cities is 1,500 direct current, and where operation is over street railway lines, the voltage is 600, except in Gastonia where it is 1,500, and both the interurban and street railway cars operate there on 1,500 voltage.

Generally speaking, the maintenance is quite adequate for the service rendered, but I would consider it to be rather of low order; that is, you find the shoulders of the ballast are not kept up and weeds, etc., are allowed to grow between the tracks; the gutters along the right-of-way are not kept cleaned out and smooth, but even so (403) that is adequate for the service that is required on the line. Such maintenance would not be suitable for heavy high speed freight or passenger traffic on a steam railroad.

I have prepared chart showing the comparative maintenance cost per mile of track of the Piedmont and Northern line and of certain steam railroad lines. This was prepared on information from the Piedmont and Northern records and the data on steam roads came from statistics of Class-1 carriers put out by the Interstate Commerce Commission. This is the defendant's Exhibit K-1. It shows that for all Class 1 steam railroads in the United States, as an average for 1920 the maintenance cost was approximately $6,900 per mile, and for all such carriers in the Southern District, it was $6,300 per mile. The Southern Railway was approximately $5,000; A. C. L., $4,600; Seaboard, $4,200; and the Piedmont and Northern $2,300 per mile. This relationship is approximately the same for all the years. For 1928, for all Class 1 steam railroads, maintenance was approximately $5,000 on the average per mile; for such roads in the Southern District, $4,800; Southern Railway, $4,200; A. C. L., $3,500; Seaboard, $2,700; Piedmont and Northern $1,800. The statistics for 1928 was the last available from the Interstate Commerce Commission Reports, and 1920 was the year that the Transportation Act was

passed. So far as my studying the subject goes, these two years fairly represent the comparative maintenance cost per mile of track for the roads shown.

I made a study of the equipment of the Piedmont and Northern passenger cars, locomotives, etc. All of the locomotives of the Piedmont and Northern are designed so that they might be available on every mile of (404) track on the system, which differentiates them from steam railway electrification, where several classes of locomotives are used for different purposes. I am referring particularly to switching operations and main line operations. If the voltage was the same, the locomotives in use on the Piedmont and Northern would pull light trains on main line electrified sections of steam railroads. They are not adaptable to trains with the traffic which is ordinarily found on steam railway electrified sections, and the voltage used on such main line steam railway sections is higher as testified to by Mr. Storer.

The Piedmont and Northern substations not only have low capacities as to individual units, but also the total capacity of the substations is low. The capacity of the substation at Hoskins, is 1,500 kilowatts. The capacity of the total system, both North and South Carolina, is only 10,600 kilowatts, which means 75 to 80 kilowatts per mile of line. On some of the recent steam railway electrifications, the capacities are considerably higher. The Delaware and Lackawanna electrification has a capacity of 12,000 kilowatts in one substation, or more than the capacity of the total substations on the Piedmont and Northern, and the total substation capacity of the D. L. and W., is, I think, about 36,000 kilowatts, and the length of its electrified mileage is, I think, 160 miles, as compared with 130 on the Piedmont and Northern. The kilowatt capacity of substations per mile of line on the D. L. and W. about 225. If the Piedmont and Northern were to change its track and equipment so as to haul much larger trains and use these larger locomotives, the whole situation would have to be revised. The capacity is not in these substations to carry big-
(405) ger loads. The present substations would have to be abandoned and others built.

The shop equipment of the Piedmont and Northern covers the usual mechanical contrivances, such as lathes,

wheel presses, etc., but it is particularly adaptable for light weight equipment, for instance, the equipment for turning down wheels is for small wheels. I think all of the wheels on the equipment of the Piedmont and Northern are 36 inches in diameter, and the wheel presses, or wheel lathes, I think, will take up to about 48 inches, but would not begin to be adaptable for the larger type wheel on the larger type locomotives, such as are on electrified sections of steam railroads where they run anywhere from 53 to 55 inches and upward.

The business of the Piedmont and Northern, of course, covers the transportation of both freight and passengers. Since the beginning of the railroad, or at the beginning, both branches of service prospered, and up until about 1920, the passenger business was a substantial part of the total revenues. I think there is one year in there, 1918, when the passenger business exceeded the freight business, and I am speaking now of revenue.

1918 was the peak year for passenger traffic on account of the Army camps hereabout, but the general decline in passenger business began to be most felt from 1920 on. That of course, is due entirely to the increasing use of the passenger automobile, which was first felt as early as 1913 or 1914, that is seriously felt by the electric railways. In the street railway part of the business at that time the jitney, so-called, had become such a com-
(406) petitor that it brought about the development of what is known as the Burney car, or the one-man car in order to accomplish economies and meet the competition of the jitneys. It was natural that that situation should be felt first in the cities, because the road developments had not at that time extended very far into the country, which was covered normally by the interurban, and they felt the reflection of this situation at a later date. This railroad of course began to feel it most from 1920 on.

The decrease in passenger revenues indicated by the statements put in evidence as to the Piedmont and Northern passenger traffic are characteristic of other electric railways commonly known as interurbans; some of them had to go out of business. The effect that the use of automobiles and motor busses upon passenger traffic has been felt by steam railroads. The reflection of it in their

revennes has not been so sharp nor has it been such an important thing with them as compared to the effect upon interurban electric railways, because the steam railroads are normally a long-haul proposition, and the traffic carried by automobiles is comparative to the railroads, short-haul traffic.

I have made a study of the stations on the Piedmont and Northern mileage as compared with stations on the Southern Railway through this same territory, both as to the number of stations and the distance between them, and have prepared the chart, which is defendant's Exhibit L-1. Also I have prepared the chart entitled "Comparison of distances between Stations", which is defendant's Exhibit M-1.

(407) Exhibit L-1 shows the number of stations on the Piedmont and Northern, as compared with those on the Southern Railway in the same territory. It shows in the case of the Piedmont and Northern from Greenwood to Belton 22 regular and flag stops, while the Southern has 7; from Belton to Greenville, 19 on the Piedmont and Northern, 11 on the Southern; from Greenville to Spartanburg, 27 on the Piedmont and Northern, 11 on the Southern; from Belton to Anderson, 14 on the Piedmont and Northern, 3 on the Southern. From Gastonia to Charlotte there are 18 on the Piedmont and Northern, and five on the Southern.

On the other chart, Exhibit M-1, the average distance between stations on the railroads shown on the chart are as follows: Norfolk and Western (Norfolk Division), a little over 3½ miles apart; on the Clinchfield, about 2½ miles; on the Southern, Charlotte Division, about 2.9 miles, on the Spartanburg Division, about 2.8 miles, and these are all average distances between stations; on the C. and W. C., about 3¼ miles; S. A. L., North Carolina Division, about 3½ miles; South Carolina Division, about 3.6 miles. On the Piedmont and Northern, North Carolina Division and South Carolina Division, about 1¼ miles between stations. These two charts relate to passenger stations.

I have observed that communities exist around these passenger stations of the Piedmont and Northern, and generally speaking, industries are located in and about

these communities, particularly on the North Carolina Division.

(408) I have prepared a chart entitled "Comparison of passenger cars per train" showing comparison between the Piedmont and Northern passenger trains and passenger trains of steam railroads. This is Exhibit N-1. It shows for the 2 years, 1920 and 1928, comparison of average number of passenger cars per train as between the Piedmont and Northern and Class 1 steam railroads of the United States, Class 1 steam railroads of the Southern District, Southern Railway, A. C. L., and S. A. L. For 1920 it shows for Class 1 steam railroads of the United States an average of about 6 passenger cars per train; for the Southern District, about 6½; Southern Railway, slightly over 6; A. C. L., about 6½; S. A. L., about 5½; Piedmont and Northern, about 1.6 cars per train. For 1928, it shows for Class 1 steam railroads 6¾; Southern District 6-3/10; Southern Railway, about 6.5; A. C. L., about 7¼; S. A. L., about 7; Piedmont and Northern, about 1.2. I took the year 1920 because it was the year the Transportation Act was passed; 1928 was the latest *avaiable* from the Interstate Commerce Commission data. These two years are fairly representative of conditions generally prevailing throughout the last ten years. A part of the duty of the motormen on the Piedmont and Northern is to handle baggage and mail in addition to operating the car. I observed him helping the express man load express, and also handling baggage and mail independently when alone in the cab. Mail and express are carried in the passenger cars in the front-end compartment usually, which is the same compartment in which the motorman sits. I noticed that the passenger trains slow down to very slow speed for ordinary highway crossings; I noticed this on the North-
(409) ern Division.

I have prepared a chart, Exhibit O-1, showing a comparison of freight revenues of the Piedmont and Northern for the years 1920 and 1928, with freight revenues of steam railroads. The comparison is not per mile, but in dollars, in total revenue from freight traffic. The scale at the bottom is in millions of dollars.

The comparison is made with all Class 1 carriers in the United States, with the Southern Railway, the Louisville and Nashville, A. C. L., Southern Railway in North

and South Carolina, and S. A. L. The figures for 1928 in relation to the Southern Railway in North and South Carolina were not available, so I have left that place blank. It shows in 1920 the freight revenues of the Piedmont and Northern were approximately .02 of 1 per cent of the revenues of Class 1 railways in the United States, and slightly less than 1 per cent of the Southern Railway. In 1928 they were about .05 of 1 per cent of all Class 1 railways in the United States and about 2 per cent of those of the Southern Railway. The Piedmont and Northern revenue in dollars from freight in 1920 was $1,026,000 against $100,300,000 for the Southern Railway, and $4,317,000,000 for all Class 1 carriers. Similar figures for 1928 are $2,185,000 for the Piedmont and Northern, as against $108,600,000 for the Southern, and $4,680,000,000 for all the Class 1 carriers. The Exhibit also shows that in 1920 the freight revenue of the A. C. L., and L. and N. aggregated approximately $151,000,000 and in 1928 approximately $162,000,000. In round figures the freight revenue of all electric railways reporting to the Interstate Commerce Commission for 1928 was $38,000,000.

I have prepared a chart entitled "Comparison of (410) Tons Revenue Freight per Train", which is defendant's Exhibit P-1. I have also prepared chart entitled "Comparison of Loaded and Empty Freight Cars per Train", which is the defendant's Exhibit Q-1; the comparisons being for the years 1921 and 1928. Class 1 steam carriers for the United States show for 1921 an average of approximately 580 tons of revenue freight per train; class 1 steam railroads of the Southern District about the same; the Southern Railway about 390 tons per train; Atlantic Coast Line, approximately 350; Seaboard Air Line, about 380; while the Piedmont and Northern is approximately 160. For 1928 Class 1 steam railroads for the United States show about 720 tons per train; in the Southern District about 740; the Southern Railway Company 480; Atlantic Coast Line about 420; Seaboard, about 480; and the Piedmont and Northern, approximately 230. The comparison of loaded and empty freight cars per train is for the same railways and the same years; 1921 shows the average of loaded and empty freight cars per train for class 1 railroads of the United States to 38; in the Southern District, about 36; Southern

Railway Company, about 32; Atlantic Coast Line, about 37; S. A. L., 33; and the Piedmont and Northern, 14. For 1928 Class 1 steam roads, about 48; Southern District, about 45; Southern Railway, 40; A. C. L., 45; S. A. L., 42; and Piedmont and Northern, about 20. The white and black on the exhibits indicate the proportion of empty to loaded cars. 1928 was the last year for which the records on the steam railroads were available, and 1921 was taken because records for 1920 were not available. In 1920, the freight revenue of all electric railways reporting to the Interstate Commerce Commission was about .7 of 1 per cent of the freight revenue of all Class 1 steam railways reporting to the Commission. In 1928, (411) they were slightly over 3/4 of 1 per cent, or about .8 of 1 per cent.

I have prepared a chart showing the percentage of less than carload revenue freight tonnage to total revenue freight tonnage of the Piedmont and Northern and other railroads shown on the chart; it is the defendant's Exhibit R-1. The chart covers 1925 to 1929, inclusive, for the Piedmont and Northern and Southern Railway; and from 1925 to 1928, inclusive, for the other railroads. It shows a constant increase in the *precentage* of less than carload traffic of the Piedmont and Northern, expressed in tonnage, of the total revenue freight tonnage. It shows for 1925 that it was for the Piedmont and Northern about 7¼ per cent; the Southern Railway 5-3/4 per cent; Class 1 carriers in the Southern District about 3.3 per cent; and Class 1 in all districts, slightly less than 3 per cent. Skipping the intervening years, for 1928, it was 9½ per cent for the Piedmont and Northern; 5¾ per cent for the Southern; about 3 per cent for Class 1 carriers in the Southern District; and about 2¾ per cent for Class 1 in all districts. The 1929 comparison is between the Piedmont and Northern and the Southern, and is about 10.3 per cent for the Piedmont and Northern, as against 5.6 per cent for the Southern.

I have prepared a chart showing comparison of overhead tonnage as between the Southern Railway and the Piedmont and Northern; which is the defendant's Exhibit A-2. The comparison is for the years 1928 and 1929. For 1928 the bridge traffic of the Southern was slightly over 16 per cent of its total tonnage, and for 1929 about 17.7 per cent; whereas in case of the Pied-

(412) mont and Northern its bridge traffic for 1928 was 5.4 per cent of its total tonnage, and for 1929 it was 6.7 per cent. Exhibit A-2 corrects Exhibit S-1 for the years 1928 and 1929.

I have prepared a chart showing the average capacity of passing tracks, with reference to the cars they can hold, of the Piedmont and Northern and other roads shown on the chart; it is defendant's Exhibit T-1. It shows for the Northern and Western, Norfolk Division, the average is approximately 120 cars; for the Clinchfield about 80 cars; Southern Railway, Charlotte Division, about 95 cars; Spartanburg Division, about 62; for the C. and W. C., about 60 cars; S. A. L., Virginia Division, 74, North Carolina, 65, South Carolina, 70, Georgia, 57, North Florida and South Florida Divisions, 71 each. On the Piedmont and Northern, North Carolina Division, about 29 cars; South Carolina Division, about 25.

I have observed the signal system of the Piedmont and Northern Railway. It would not be suitable for a standard main line steam railroad.

With reference to the tendency of electric railways, commonly known as interurban electric railways, going into the freight business and expanding and increasing their freight business since about 1912 or 1915, this has been the tendency in order to counteract the effect brought about by the increased use of passenger automobiles in getting passenger traffic away from the interurban railways; the desire has been, and the work has progressed along the lines of aggressive solicitation of freight business by interurban railroads. The result has been that those interurbans whose facilities made it pos-
(413) sible to handle freight business did have their freight business increased.

In North and South Carolina, there are motor trucks engaged in handling freight over the good roads. I have prepared a chart showing the registration of motor trucks in South Carolina for the period 1920 and 1929, which is defendant's Exhibit U-1; also a chart containing the same information as to North Carolina for the same period, which is defendant's Exhibit V-1; and a similar chart showing the registration of motor trucks in the United States from about 1908 to 1929, which is defendant's Exhibit W-1. Exhibit U-1 shows that from 1920

to 1929 motor truck registration in South Carolina increased from a little over 7,000 to almost 26,000. Exhibit V-1 shows that from 1920 to 1929, motor truck registration increased in North Carolina from a little less than 14,000 to about 53,000; and Exhibit W-1 shows that in the United States from 1920 to 1929 such registration increased from a little over one million to over 3,300,000.

(414) W. S. LEE, recalled, testified as a witness for the defendant:

I live at Charlotte, N. C.; graduated at the Citadel Military College of South Carolina; specialized in *mathmatics* and engineering; have had very large experience in engineering and am now principally engaged as Consulting Engineer, in which my work is principally hydroelectric, high tension power transmission, big steam stations, studies in connection with electrical engineering as applied to power uses of various kinds. I have built a great many hydroelectric plants in this country and Canada; I have built several railroads, or been largely responsible for their building; have been and am now actively engaged in a very large program of consulting engineering for various interests; neither the Duke Power Company nor any of its interests have any interest in my consulting engineering practice. I am President of the W. S. Lee Engineering Corporarion; neither the Duke Power Company nor any of the Duke Interests have anything to do with that corporation. I am a member of the American Society of Civil Engineers, American Society of Mechanical Engineers, and Electro-Chemical Society; I am a Fellow and also President of the American Institute of Electrical Engineers, and a Member of the Engineering Institute of Canada.

As an engineer I designed and supervised the construction of the existing lines of the P. and N. When I graduated from College in 1894 I immediately began work on a hydroelectric development and then for a while I was in regular steam railway engineering in South Carolina, and then I was in the United States Engineering Department on Coast Defense Fortifications at Charles-
(415) ton and other South Carolina points in the Spanish-American War. I was then Resident Engineer

and Chief Engineer of the Columbus Power Company at Columbus, Georgia, and my first connection with electric railroads was with that Company, where I stayed until 1902 and then went with Dr. Gill Wylie, who was in charge of the interests now known as the Duke Interests. I completed the development of the hydroelectric plant near Rock Hill to transmit power into Charlotte and became to some extent interested in street railway work. I have been with the Southern Power Company, now the Duke Power Company, since 1905. About 1907 I began a rather active study of electric railway work; from 1900 to 1910 there were very active strides made in electrical railway work, beginning first in what we knew as street, urban or suburban lines which consisted of rather small and light equipments, but soon began to develop into another type of electric cars which were somewhat larger and reached out between towns and became more active in express, freight and passenger service. I did what I could to keep up with the development of this industry, visited cities, followed up the publications of various engineering societies, visited as many plants as I could, consulted with a good many engineers in the engineering societies and otherwise regarding this particular development which was extremely active then.

I am now President of the Piedmont and Northern Railway Company and have been since 1921. Prior to that time I was Chief Engineer and Vice President since its formation, and prior to its formation was Vice President and Chief Engineer of the Piedmont Traction Company and the Greenville, Spartanburg and Anderson Railway Company, the predecessors of the P. and N. (416) The present lines of the P. and N. were designed by and built under my supervision and direction. It was determined to build the existing lines about the early part of 1910; it had been under rather active discussion probably a year before that.

The Piedmont and Northern is the culmination or gatherings together of parts of railroads now used and certain parts of street railways. Prior to 1910 an interurban line was built from Belton to Anderson and a street car line in Anderson, known as the Anderson Traction Company; that property was acquired. There was a street car line in the City of Greenville, known as the

Greenville Traction Company, and that was acquired. There was a street car Company in Charlotte, known as the Charlotte Electric Railway, which line at that time ran through various parts of the City of Charlotte and extended West of Charlotte about 4 miles to the cotton mill settlement of Hoskins; then there was organized the Piedmont Traction Company which undertook and later did build to the City of Gastonia.

The plan contemplated the building of a line from Greenwood, or possibly some other point on the S. A. L., and extending up through Greenville, Spartanburg, Charlotte and on to Durham by a route which was not determined, but generally discussed to be laid out and built, including Winston-Salem, Salisbury, Greensboro and on to Durham. Our plans were to build between these various towns and cities a high class electric line, high speed passenger and freight *carring* road of a capacity that would give quick service, both freight and passenger, and give this service at short intervals of time. The plan was discussed with a great many prominent and influential men throughout this territory, and about the last of 1910 it was worked out in detail and submitted (417) to the public at many places throughout this section. We had public meetings at various points along the proposed line, such as Charlotte, Gastonia, Greenville, Spartanburg, Anderson, Greenwood and many others. At these meetings, I personally made announcement as to the plans, and others did also.

Exhibit X-1 is photostatic copy of the Greenville Daily News, under date of January 18, 1911, containing a report of a public meeting in Greenville, quoting a speech made by me, or an announcement of this plan. That notice states in a general way the talk I made at Greenville at that time. I had made several other talks at different places prior to that. The Exhibit states: "Mr. Lee stated that the promoters of this enterprise own the Greenville, Spartanburg and Anderson route, the Anderson Traction Company of Anderson, and the Interurban road connecting Anderson and Belton, the Greenville Traction Company, the Charlotte Street Railway and the Piedmont Traction Company.

"Mr. Lee went on to explain that the ultimate plan

of the proposed syndicate was to connect these five pieces of property by interurban lines tapping the Seaboard Air Line Railway, either at Calhoun Falls, Abbeville or Greenwood, surveys of these routes with this end in view having already been made, and extend lines beyond Charlotte.

"Mr. Lee stated that in order to carry out this great scheme of building the G. S. and A. Line, a syndicate would be organized, the holders of these several electric railway systems were to put their holdings into this syndicate at what they cost. The Interurban system connecting these various cities was to be built by an underwriting syndicate and when completed the road (418) was to be bonded, the bonds disposed of and the subscribers returned their pro rata share of the profits.

At that time my associates and I had acquired the street railways in Anderson, Greenville and Charlotte which I referred to. These had been acquired to use in tying the electric lines to be built between these cities into the street railway systems. That was our purpose in acquiring them, in order to get various terminals or entrances, and our purpose was to connect them together with lines, and I was kind of a spokesman for our interest, and I went fully into this, telling our object, and the kind of construction arrangements we were making to connect them up, and also explained to the people at the various places who the men were that were interested as syndicate managers.

With the exception of Mr. McRoberts and Messrs. J. B. and B. N. Duke, who lived near Durham, North Carolina, myself and associates in this enterprise lived in the Piedmont Section between Greenwood and Charlotte. At that time the transportation facilities in the Piedmont Section, both for freight and passengers, were very slow. The time of handling a great many things which we used in connection with the development through this Section was, I would say, three or four times the time for moving freight today. We had rather insufficient transportation in a section that was developing and growing as this Piedmont Section of North and South Carolina was at that time. In those days it took a solid day to make a trip, say, from Charlotte to Gastonia, or Greenville to Spartanburg and back, because we

had infrequent trains and they were much slower than today.

(419) There were a great many delays in the movement of local freight between nearby points in the Piedmont Section, and also delays in the movement of freight into and out of this Section from the junction points of steam railroads. I do not mean to go into the point of criticizing the railroads; they did a fairly good work, and perhaps the best they could, but there were tremendous delays and it affected all of the development work we did. We figured on shipments from the steel markets or the Northern machinery markets taking two weeks in getting here, and all of our construction programs back in that time were based on a time like that. Many of those, of course, come through now in from three to five days. We believed, and it has since been absolutely demonstrated, that we had to do something to improve the transportation facilities through this section. We found in our studies and discussions with various merchants that it was necessary to carry much larger stocks in order to be able to serve the community; we saw that that was an added cost of conducting business in the way of interest on investment. We believed that one of the best things that could be done for this section would be to get some transportation that would give a quick and prompt distribution in order that a merchant or anyone who was using building materials or machinery could get it promptly and save additional cost of interest and delay on long time shipments between the manufacturer and the user.

The Piedmont Traction Company was organized January 16, 1910; it was organized as a part of the project to which I have referred. The same is true of the Greenville, Spartanburg and Anderson Railway Company, whose charter is dated March 10, 1910. It was organized (420) pursuant to this project and as a step toward carrying it out. We got a great number of franchises from various towns along the proposed route of the railroad; they were obtained as a means of carrying out this project and were discussed at each town advising the people and the Boards of Alderman what our object was in securing the franchises.

I was one of the Syndicate managers of the Piedmnot Syndicate, which was dated January 10, 1911, and

which has been offered in evidence. Subscriptions were made to this Syndicate agreement by people living in the territory through which the line was to be constructed; there were hundreds of subscriptions. The Piedmont and Northern Railway was incorporated as a means of carrying out this project which I have referred to. The Piedmont Traction Company acquired the Charlotte Electric Railway and built the mileage between Charlotte and Gastonia and the street railway line in Charlotte. The Piedmont Traction Company, by deed dated May 20, 1914, transferred to the P. and N. all the property then owned by the Piedmont Traction Company, including the line from Charlotte to Gastonia, the street railway system in Gastonia and trackage rights over the street railway system in Charlotte. The G. S. and A. built the lines between the cities in South Carolina, acquired the street railway systems in Greenville and Anderson and the interurban line from Belton to Anderson. The G. S. and A., on June 10, 1914, transferred to the P. and N. all of the property of the G. S. and A., including the lines between the cities in South Carolina, and trackage rights over the street railway systems in Anderson and Greenville.

These transfers made by the G. S. and A. and Piedmont Traction Company to the Piedmont and Northern (421) Railway Company in May and June, 1914, were made in order that the P. and N. might be in a position to execute the mortgage to the Farmers' Loan and Trust Company, dated July 1, 1914, securing a First Mortgage forty year gold bond issue of Fifty Million Dollars. The loan was placed upon the combined properties. The line into Spartanburg was completed and put into operation in April, 1914, so that at the time of the execution of this mortgage, the present lines of the P. and N. had been constructed. The provision in the mortgage for Fifty Million Dollars of bonds was placed there because we had to give to the stockholders in the properties that had been developed about Six Million Dollars for their holdings, and had to take down some other bonds for other purposes, and that left us approximately Forty Million Dollars to complete the other part of the road extending on toward Durham. Part of the bond issue was for the purpose of providing funds to develop the line between Gastonia and Spartanburg.

The present two lines, about 23 miles in North Carolina, and the other of about 90 miles in South Carolina, with a gap of about 50 miles between them, extending from Spartanburg to Gastonia, were not constructed to be operated separately; we never contemplated anything except joining them together, building and connecting them up from one end to the other, and I certainly would not have been interested in the railroad if I had thought it was never going to be put together. Before we constructed any part of the line we gave considerable attention to the construction of the line from Spartanburg to Gastonia, and in fact Mr. Duke and I talked with Mr. Capps of the Seaboard Air Line, we considered connecting that up and Mr. Capps was right urgent that we do it right away. That was before we ever constructed a particle of any of it; we considered this exceedingly important for the whole property. We had determined to
(422) construct this line between Spartanburg and Gastonia before the existing lines were constructed. The existing lines were constructed in sections. The first was by the Piedmont Traction Company from Hoskins to Gastonia, and we first intended building this section to Kings Mountain. The first section built in South Carolina was from Greenwood to Greenville and a second section by different contractors from Greenville to Spartanburg. I had found that doing work of this character in sections was more economical and the work was more easily built. Just as soon as a section was completed it was put in operation.

Prior to the completion of the line into Spartanburg in April, 1914, I had gone over with the engineers the different parts of the route, and reconnoitered the line, between Spartanburg and Gastonia. I had examined Spartanburg property and authorized the purchase of such property as would permit us to extend through Spartanburg; I had two or three surveys made and took options on considerable property for extending around and beyond Spartanburg. The blue print you show me, P. and N. Railway Resurvey of Spartanburg property, June 20, 1929, shows the property which we acquired in Spartanburg and shows the dates when that property was acquired. This property was bought, practically all of it, in 1912 as I recall, possibly part of it in 1913. The blue print is Defendant's Exhibit Y-T. That property

was acquired in 1912 after we had made three distinct surveys in an endeavor to get through Spartanburg and go on North to Gastonia. The map shows how we were to get out of Spartanburg North toward Gastonia. We still own that property beyond our yards and terminals extending up and adjoining the property of the Southern
(423) Railway, and also the property of the Clinchfield. Subject to certain changes made a year or more ago, as a result of an agreement between the P. and N., the Clinchfield and the C. and W. C., it is now proposed to build this line from Spartanburg to Gastonia on the location which was made in 1912, and which is shown on the blue print. We have agreed to make some very slight adjustments of alignment to permit the C. and W. C., and the Clinchfield to connect their lines through there, and I have had a part of the road graded.

The survey in 1912 was made by Major Thos. B. Lee, locating engineer for the P. and N. The resurvey June 20, 1929, was made in connection with the agreement between the P. and N., the Clinchfield and the C. and W. C. This agreement is dated August 23, 1929.

As heretofore stated by me, the project of constructing this line between Spartanburg and Gastonia has never been abandoned, as I understand it. The reasons why the work was suspended are that we finished the Spartanburg-Greenville section in 1914; at that time we were in the throes of the World War, not this country, but the condition of things was such that we didn't think we should go ahead with a scheme of this magnitude and we delayed further construction with the hope of being able to start it up from time to time. I was at work on several large projects at that time and on some of these I advised discontinuance. When we delayed further building of this road we felt sure it would be started up in a reasonably short time, but conditions did not warrant that for some time due to the upset condition of the world, finances and various things that enter into the construction of such a project. In the proceed-
(424) ing instituted before the Interstate Commerce Commission several years ago, the P. and N. Railway at that time did contemplate the construction of a line North of Charlotte to Winston-Salem in addition to this line between Spartanburg and Gastonia. As the time of the institution of this present suit, in March of this

year, the defendant company was not engaged in the construction of any line of railroad except the line between Spartanburg and Gastonia, and at that time neither the defendant nor any one on its behalf was taking any steps or doing any act with reference to the construction, or relating to the construction of any line of railroad except this line between Spartanburg and *Gastonia*.

I am familiar with the resolution of the directors of the P. and N. of March 10, 1930, introduced in evidence as the Plaintiff's Exhibit No. 1. I have no authority to build any other line of railroad except as expressed in that resolution. I sent a certified copy of this resolution to Honorable B. H. Meyer, Chairman, Division 4, Interstate Commerce Commission, Washington, D. C., under date of March 11, 1930, and wrote him a letter enclosing the resolution. The letter you hand me is the letter which I wrote to Mr. Meyer and has the certified copy of the resolution attached to it. It is the Defendant's Exhibit Z-1, and is as follows:

"I enclose herewith a duly certified transcript from the minutes of a meeting of the Board of Directors of the Piedmont and Northern Railway Company held on March 10, 1930.

"We began this morning at Spartanburg, South Carolina, and at Gastonia, North Carolina, and are now engaged on the construction of the line from Spartanburg (425) to Gastonia, which will connect the existing South Carolina mileage extending from Greenwood to Spartanburg with the existing North Carolina mileage extending from Gastonia to Charlotte.

"I am very anxious that the Commission will realize that this course has been taken, not because there is any disposition whatsoever on the part of my company or any of its officers to disregard the views of the Commission, but because, under the decision of the Supreme Court of the United States, there does not seem to be any other way for us to assert our conception of our legal rights.

"We very earnestly sought a method whereby the question involved might be predetermined, but the Supreme Court has *dediced* that no predetermination can be secured. Therefore, we are, with high respect for

the Commission, taking the steps which we have decided upon as the only way in which we can orderly assert what we believe to be our rights under the law.

"Respectfully yours,

W. S. LEE, President."

The approximate 53 miles between Spartanburg and Gastonia separates the two properties of the P. and N., both of which are comparatively short lines. It is highly essential that these properties be connected up for the reason that it is easier operated and makes them more economically operated and I think protects the property more than to have them disjointed as at present. Should the P. and N. Railway, or anybody connected with it, in the future undertake to build a line North of Charlotte to Winston-Salem or Durham, my position as President would be that I would personally advise the Board of Directors to notify the proper parties, the Interstate (426) Commerce Commission and also anybody else that I might think would be in a position to know what we wanted to do.

Defendant proposes to build a road almost exactly, or as near as we can, subject to some slightly modern improvements in some of the apparatus, of the same type as we now have on each side of that territory, to be operated in the same way with the same kind of equipment, in fact the same equipment as we now have, same cars and same locomotives. On the line between Spartanburg and Gastonia, we propose to handle passengers, freight, mail and express. We are going to handle whatever the public offers us and give them the best service and handle it in the most expeditious way we know how. I designed the present lines and supervised their construction; was Chief Engineer; had charge of the selection of equipment and supplies; final approval of specifications. The road I designed and constructed was at that time known to me and to the public I think as an interurban electric line. The motive power for these lines has been since the beginning, and still is, electric power; no other motive power except electricity has ever been used in the operation of these lines. On the line from Spartanburg to Gastonia, we propose to use exactly the same type of *appratus,* in fact the same apparatus.

No steam railroad corporation owns any stock in the Piedmont and Northern Railway Company that I know of; the Piedmont and Northern owns no stock in any steam railroad corporation. There is no relationship or association between the P. and N. and any steam railroad corporation or corporation owning or operating a steam railroad, except the usual interchange of freight. I have never been over the property of the Durham and Southern Railroad; I have been at its terminal, but not (427) over its property. The P. and N. does not pay any of its officers or employees for services which they perform for the Durham and Southern Railway. There are certain men who are employed by both companies, but I am employed by the Piedmont and Northern Railway and I have never heard of any connection between the operation of the companies, and, to be frank, I would not permit any; I mean of the Durham and Southern and the Piedmont and Northern; they are separate and distinct companies, just the same as any other corporation, as far as I knew; they are managed absolutely separately; have separate Boards of Directors; they are operated separately and distinctly, absolutely.

There are certain things on the P. and N. that are entirely different from the Southern; the rails may be the same section; the bridges may be alike; they are built under standard specifications and many of the ties may be alike, but the P. and N. has a line of rails that not only act as rails for transporting their trains, but they are bonded together by strap copper, welded from rail to rail and form one leg of a circuit for carrying large blocks of power for propelling this apparatus. The P. and N. has no coal chutes, pumps, water tanks and all those things; it has no use for them. It operates in a different way and has a different type of construction. The voltage on the P. and N. is 1,500 volts direct current, transmitted by a line of poles with conductors and clamps and other circuits for supplying the voltage; this acts as one leg of the circuit erected above the track in which a high strength steel wire supports a copper conductor in an endeavor to hold the copper straight so that the trolley or pantograph can move along on it. In addition to this, there is an aluminum or copper conductor which carries an additional supply of power to the trolley, and on the track in addition to being bonded

(428) together by strap copper, it has cross-connected conductors which pass the power back and forth from one rail to another and makes an economical and uniform distribution of the power.

The P. and E. makes no distinction in its manner and method of handling freight between freight that has both origin and destination on its line and interline freight. It is handled to all parts of the line in exactly the same way, whether it is going off the line to another carrier or coming on the line from another carrier, or is strictly local.

It is well known that all of this part of the Piedmont Section has magnificent roads, and they are being built from time to time. The motor truck is the real problem in railroad construction today. Trucks are increasing rapidly and are a very important factor in the life of any railroad, and especially a short line railroad. Trucks are hauling freight, and of course the buses are hauling passengers, all around through this section of the country where these roads are, and this is the real problem we have.

Now, if the Piedmont and Northern Railway were to connect this line of 53 miles between Spartanburg and Gastonia, it would be of immense value to it, because it would not only get additional passenger business from the new line, but it would get additional passengers for the other lines, and with the service we give, the prompt overnight service, or the short interval service on our freight transportation, we would be able to capture a considerable amount of this truck business. Our problem is, as I said before, competing with these trucks, and it makes it harder to do it, especially if our line is short. (429) In case the line of the P. and N. is constructed from Gastonia to Spartanburg, we would certainly get a large amount of the cotton now being transported by motor truck, and also textiles which are now trucked, say, from North Carolina to South Carolina for finishing plants or back the other way; that is getting to be rather large in amount, and while I could not put it in carloads, I am sure that with our organization and the service that we give, that we would get a very substantial part of it.

CROSS EXAMINATION.

The testimony given in a formal proceeding, which I have heretofore referred to, is the testimony which I gave before the Examiner of the Interstate Commerce Commission in Finance Docket No. 6208, application of the P. and N. Railway for certificate of public convenience and necessity; that is the only former testimony to which I have alluded to in my testimony before this Court.

You show me a copy of letter dated March 8, 1927, addressed to W. S. Lee, signed by B. H. Meyer, Commissioner; I received that letter. As I understood, Mr. Meyer was a member of the Interstate Commerce Commission.

With reference to Exhibit X-1, copy of a daily newspaper, this newspaper also contains the following: "Mr. Lee explained that the syndicate was to be managed by a syndicate board of six members, consisting of Messrs. J. B. Duke, B. N. Duke, Louis W. Parker,"—and so on, naming the gentlemen. "As to the freight proposition, Mr. Lee stated that contracts had been made with certain trunk lines for the exchange of freight." The paper further states, in reference to Mr. Z. V. Taylor, who was an employee of the Piedmont and Northern, the following:

"Mr. Taylor later stated that already over four (430) and one-half millions of dollars had been subscribed to the syndicate and that as soon as the shares wished from Greenville, Anderson and immediate towns have been raised and the freight contracts signed, work on the construction of the line would begin within 30 days."

"At this point contract forms for the 50 per cent of freight business were brought forth and passed among the members present. Cotton mill presidents, merchants and heads of other enterprises signed contracts assigning to the proposed company 50 per cent of their freight. Committees were then appointed to canvas the city today and receive additional subscriptions and freight contracts.

"The statement was then made at the request of Mr. J. B. Duke that within 30 days after these contracts were signed and the necessary subscriptions made, work would begin on the construction of the G. S. and A. Railway.

"The following are the forms of the freight contracts and subscription contracts entered into between the Greenville, Anderson & Spartanburg Railway Company and the Greenville business men."

"Memorandum of agreement, made and entered into this — day of ——— 191— by and between the Greenville, Spartanburg and Anderson Railway Company, etc. 'Now therefore in consideration of the foregoing, and in order to induce others to enter into like agreements, and as an inducement to the building and operation of said railroad, said shipper does hereby covenant, promise and agree to and with said railroad, as follows:

Whenever said railroad, to-wit: A railroad built by the railroad company which will afford to the shipper an outlet by rail for its product, and this without respect (431) to the termini or route of said railroad, is in operation, and whenever it gives to said shipper rates as low as said shipper can otherwise legally secure, and the cost of delivering shipments to or from the proposed railroad does not exceed cost when routed over the lines of a competing carrier, then said shipper shall and will give to said railroad company at least 50 per centum (50 per cent) of all traffic and freight moved by rail, incident to the transaction of business by and the operation of the work of said shipper, whether consigned to or consigned by said shipper"—and so forth.

The contract was passed around at that time among shippers by a committee of the Chamber of Commerce. Some were signed and others were brought it. On the whole, I would say that that was a very fair report of the meeting. After that a large number of similar contracts with shippers for 50 per cent of their traffic to and from their manufacturing enterprises were entered into.

RE-DIRECT.

The circular letter of May 25, 1920, addressed to all

carriers, is something I have never heard of. If the P. and N. received it I knew nothing about it, and the first time I heard about it was in the case before the Interstate Commerce Commission.

I feel quite certain that no one representing the Piedmont and Northern Railway Company appeared before any committee of Congress when the question of the Transportation Act was up; I didn't know about it if they did. Mr. Duke took a rather liberal subscription to the project of the P. and N.; I think it fell to my job to do most of the work; we secured other engineers; (432) hired a man by the name of J. P. Clark, who came from the Michigan United Railways that had railroads of similar character, and he assisted me in connection with this work, as he had had a lot of experience along that line.

## REBUTTAL EVIDENCE FOR PLAINTIFFS.

P. F. MARSH, recalled, testified:

The minutes of the Piedmont and Northern Railway Company contain a minute under date of September 8, 1914, of an adjourned annual meeting of directors. At that meeting the following resolution was adopted:

Be it resolved that the thanks and appreciation of this board of directors be extended to Messrs. J. B. Duke, B. N. Duke and Samuel McRoberts for their untiring efforts, loyalty and spirit in the organization, financing and construction of the Piedmont and Northern through the Piedmont section of the Carolinas, which in the opinion of this Board of Directors is of great benefit in the upbuilding of the country and the development of the natural resources, and—

Be it further resolved that the Secretary be and hereby is instructed to send to each of the above named gentleman certified copies of this resolution.

With reference to special meeting of stockholders of the P. and N. on December 8, 1926, this meeting was called pursuant to a resolution adopted at a meeting of

the Board of Directors on November 3, 1926. At this special meeting of the stockholders a resolution was passed, in the same language as was the resolution of the meeting of the Board of Directors which called this stockholders' meeting, which has already been read into the record. The resolution goes on to state:

(433) After said resolution had been read to the meeting by the secretary, Mr. J. P. Gossett moved the adoption of said resolution. The motion of Mr. J. P. Gossett that said resolution be adopted was seconded by Captain E. A. Smyth.

In my examination of the accounts of the Piedmont and Northern, I found entries for the month of March and also for April, 1930, in the account entitled "Charlotte to Winston-Salem, covering expenditures subsequent to March 10, 1930". They were very small items; however the account was not closed. The items were small for the first three months of the year 1930; the total of the account was large up to the end of December 31, 1929. As I recall, there were some minor adjustments in the account to credit back to that account,—certain expenditures for office rent, as I recall; I know the statements I put in evidence showed that the only thing carried in that account in March, 1930, was $100 charged to the Law Department, which is split fifty-fifty between those two accounts, and the Accounting Department the same way. In March and April that is about all that was charged to that account; may have been some telegrams or things of that kind. The account was still open on the books the last time I saw it when I was in Charlotte on June 8th. The statement you show me is statement of cost of *porposed* extensions as of April 30, 1930, showing the monthly charge for April to the Charlotte-Winston-Salem account and to the Gastonia and Spartanburg account; shows total for the month and total up to and including April 30, 1930. It is a monthly statement prepared by Mr. Hardin, the Auditor; it is the paper submitted to me by the P. and N.; it is the Commission's Exhibit 110. This exhibit shows statement of cost of proposed extension as of
(434) April 30, 1930, showing charges for the month of April, 1930; it shows charged to the Charlotte to Winston-Salem account, $4.25 for engineering, $1,473.70 to

interest on funds used for construction, $50 to salary of attorney, $50, salary of Accounting Department; $17.07 to refund on telephone calls, and a debit of $83.30, refund, court costs.

CROSS EXAMINATION.

Exhibit 88 shows for the month of March, 1930, there was $7,785.43 charged to the Gastonia-Spartanburg line and $1,526.70 to the Charlotte-Winston-Salem line; so far as I know none of these items making up the $1,526.70 relates to construction. These interest charges were made at the end of each month, just adding the additional interest on an accrual basis.

Exhibit 110 shows in addition to the items already stated in connection wth the Charlotte-Winston-Salem line $5,785.52 for the Gastonia-Spartanburg line. I examined the books for the month of May, 1930, but made no statement of it. I don't know when the account for the Charlotte-Winston-Salem line was actually closed. The last time I saw it, it was not closed. In February, 1930, there was charged to this Winston-Salem line $1,663.90 and to the Gastonia-Spartanburg line $806.10.

Exhibit 109 is letter identified by Mr. Lee, dated March 8, 1927, written by B. H. Meyer, Commissioner, to W. S. Lee, President of the Piedmont and Northern Railway Company, Charlotte, N. C., and is as follows:

You are referred to an exchange of correspondence with Director Mahaffie last December, with reference to proposed extensions of the Piedmont and Northern and the issuance of securities to Finance such extensions.

Under our instructions an examination has recently been made of your property and its traffic. As a result (435) thereof and in the light of the fuller information now available, we have concluded that the opinion expressed in the secretary's letter of October 12, 1920, to which you referred, can no longer be relied on. It is our conclusion on the basis of the facts now before us that the Piedmont and Northern is not an electric interurban railway within the meaning of section 1 of paragraphs (18) to (21) or of section 20a, but on the contrary is subject in all respects to the requirements of those sections.

You are, therefore, advised that before the Piedmont and Northern constructs any extensions to its lines or issues any securities it will be expected to file appropriate applications for authority therefor under sections 1 and 20a. The filing of such applications will, of course, be without prejudice to your right to assert that the Commission has no jurisdiction over your property in those respects and to adduce whatever evidence you may desire to support such contention. In this connection I desire to call your attention to the opinion of the Supreme Court of the United States in *Texas and Pacific Railway* vs. *Gulf, Colorado and Santa Fe Railway Company,* 270 U. S. 266, in which the Court said:

Paragraph 18 prohibits construction of an extension without obtaining the certificate. Paragraphs 19 and 20 provide that a carrier desiring to construct one may apply for the certificate and prescribe the method of proceeding. Whenever such an application is made, the Commission may pass incidentally upon the question whether what is called an extension is in fact such; for, if it proves to be only an industrial track, the Commission must decline, on that ground, to issue a certificate. (436) A carrier desiring to construct new tracks does not, by making application to the Commission, necessarily admit that they constitute an extension. It may secure a determination of the question, without waiving any right, by asserting in the application that in its opinion a certificate is not required because the construction involves only an industrial track.

"Yours very truly,

B. H. MEYER, Commissioner."

Exhibit 111 is series of letters having reference to the same matter as the Defendant's Exhibit G-1. The first letter is dated July 30, 1920, addressed to Mr. George B. McGinty, Secretary, Interstate Commerce Commission, Washington, D. C., and is from Mr. Bond Anderson, Auditor, as follows:

As you know, the P. and N. Railway Company is a

common carrier, engaged in the general transportation of passenger and freight traffic:

I shall thank you for an interpretation of the following extracts from the Transportation Act:

"1—'Title III, Section 300, Paragraph 1—'The term 'carrier' includes any express company, sleeping car company, and any carrier by railroad, subject to the Interstate Commerce Act, except a street, interurban, or suburban electric railway not operating as a part of a general steam railroad system of transportation.'

"2.—'Title IV, Section 422—15a: 'When used in this section the term 'rates' means rates, fares, and charges, and all classifications, regulations, and practices, relating thereto; the term 'carrier' means a carrier by railroad or partly by railroad and partly by water, within the continental United States, subject to this Act, excluding (a) sleeping-car com-
(437) panies and express companies, (b) street or suburban electric railways unless operated as a part of a general steam railroad system of transportation, (c) interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight,' etc.

"3.—Title IV, Section 439-20a (1): "That as in this section the term 'carrier' means a common carrier by railroad (except a street, suburban or interurban electric railway which is not operated as a part of a general steam railroad system of transportation) which is subject to this Act, or any corporation organized for the purpose of engaging in transportation by railroad subject to this Act.'

"You will observe the clauses quoted have slightly different wording in each case and, while I understand the exceptions, as far as they pertain to street car, interurban or suburban electric railway systems which are not engaged in the general transportation of freight, it is not clear just how each of the sections quoted affects

the P. and N. Railway Company, in view of the fact that it is a common carrier in the true sense of the term.

"If the P. and N. Railway is not included in Title III, Section 300, I take it that we are not amenable to the decision of the Wage Board recently handed down and, if that be true, naturally the P. and N. Railway Company would not be subject to Section 312, under the same title. I would like to be absolutely sure about this feature, however.

"I believe you have recently promulgated an order in respect to adjustment of wages as handed down by the Wage Board, but do not find where we have received a copy of such order and shall appreciate it very (438) much if you will kindly send me two copies as a matter of information, even though the P. and N. Railway Company may not be included therein. If it is not included therein, will it be included in the decision which I understand is to be forthcoming in respect to short-line railroads?

"I take it that Title 4, Section 422, is clearly applicable to the P. and N. Railway Company in so far as adjustment of rates is concerned.

"It is not clear, however, whether the P. and N. Railway Company is subject to 439 and I shall appreciate very much your decision in respect to that section, at your early convenience.

"Yours very truly,

BOND ANDERSON, Auditor."

The next letter is dated August 17, 1920, and is as follows:

"Mr. Bond Anderson, Auditor,
Piedmont and Northern Railway Company,
Charlotte, N. C.

Dear Sir:

This will acknowledge the receipt of your letter of July 30, 1920, file 256, relative to interpretation of various portions of the Transportation Act, 1920.

This matter is receiving consideration, and you will be further advised in regard thereto at an early date.

"Respectfully,

A. HOLMEAD,
Acting Secretary."

The next letter is dated August 30, 1920, addressed to Mr. Anderson by the Secretary of the Commission, and is as follows:

"Dear Sir:

Again referring to your letter of July 30, file 256,-(439) relative to the application of certain sections of the Transportation Act, 1920, to your line:

Before an informal ruling may be made in this case you are requested to advise if your line is operated as a part of a general steam railroad system of transportation.

Respectfully,

G. B. McGINTY, Secretary."

The next letter is dated September 3, 1920, addressed to Mr. G. B. McGinty, written on letterhead of Piedmont and Northern Railway Company and is as follows:

Referring to your favor of the 30th ult., File 511179, I beg to advise that the P. and N. Railway is a common carrier, in the usual sense of the term, engaged in the general transportation of freight and passenger business, just the same as any other steam road, although it is an electric line and not affiliated with a steam railroad system nor a part of such a system. It is a separately-operated property and electrically operated.

If this does not give you the desired information, please advise.

Yours very truly,

(Signed) "BOND ANDERSON, Auditor."

Then followed the exchange of letters introduced as defendant's Exhibit G-1.

MR. E. R. OLIVER, recalled, testified:

I have compiled a statement from the records of the Southern Railway, for 1928 and 1929, of the proportion of its total traffic represented by overhead or bridge traffic in terms of revenue instead of tonnage; it refers to traffic received from connections and delivered to connections; for 1928 the total was 13.6 per cent; 1929, 13.8 per cent; 1930, 14.8 per cent, that is, for 1930 up to the (440) first seven months.

CROSS EXAMINATION.

Those figures are for the Southern Railway and not the Southern Railway System; I do not have similar figures for the Southern Railway System. The following lines are included in what is known as the Southern Railway System, being a sort of master organization that operates these various separate corporate entities:

The Cincinnati, New Orleans & Texas Pacific Railway.

The Alabama-Great Southern Railroad Company.

New Orleans and Northeastern Railroad Company.

The Georgia, Southern & Florida Railway Company.

The Northern Alabama Railway Company.

The Cincinnati, Burnside and Cumberland River Railroad Company.

The New Orleans Terminal Company.

The St. Johns River Terminal Company." Also the Harriman and Northeastern Railroad Company. The Mobile and Ohio is not known as a part of the Southern Railway System; we have a majority ownership in the Mobile and Ohio, but it is separately operated and is not known as a part of the Southern Railway System for operating purposes; Mr. Fairfax Harrison is its president and is also president of the Southern Railroad. I think the Southern Railroad owns much more than a majority of the stock in the Mobile and Ohio. The Yadkin Railroad is a Southern Railway subsidiary

line, but it is not operated as a part of the Southern Railway System. Mr. Fairfax Harrison is its president. The Blue Ridge Railroad is in the same category as the Yadkin. Mr. Fairfax Harrison is its president. The Carolina and Northwestern is listed as a Southern Railway subsidiary line through our ownership of its (441) bonds and Mr. Harrison is its president; the same is true of the Danville and Western Railway.

The High Point, Randleman, Asheboro and Southern is a Southern Railway subsidiary; its status is the same as the Blue Ridge and Yadkin. All of these railroads report separately to the Interstate Commerce Commission; these lines have substantially the same officers as the Southern Railway, except the subsidiary lines. As to all of the subsidiary lines mentioned, Mr. Fairfax Harrison is the President and Mr. Wynne is the Vice President; these roads have the same *controller* as the Southern Railway and the same treasurer and the same minor officers, but with that exception the officers of the Southern Railway System are not officers of these subsidiary short lines.

As to most of the industries on the Piedmont and Northern and on the Southern Lines between Greenville and Spartanburg, I must rather reluctantly admit that the Piedmont and Northern gets the majority of the business; that is not true of all of it; for instance, the Pacific Mills divide their traffic about equally between the two lines. As I understand, the P. and N. gets a very heavy proportion of the general traffic from the Town of Greer, not only from industries which they directly serve, but industries which the Southern Railway serves exclusively. We switch for the P. and N. at Greer and they have been quite successful in competing with us for this tonnage. I do not have the exact figures, but as I have heretofore stated, the influence of the P. and N. has made it practically impossible for us to compete with them at these common points. I could not say what the revenue of the Southern was at the Town of Greer today, compared to what it was ten or fifteen years ago. (442) When the P. and N. built its line through here, it generally took contracts with industries in which they guaranteed to give the P. and N. 50 per cent of their business; these contracts were taken at all common points on the line and are in effect today and my informa-

tion is that they are being rather religiously observed, and if anything, the P. and N. is getting more than its contractual proportion of this tonnage.

The traffic policy of these subsidiary roads, which are not a part of the Southern Railway System, is controlled by George H. Dugan, who is one of their Vice Presidents. The Southern handles its business with these roads in conference as we do our business with any other railroad in the territory. My contact with Mr. Dugan is pretty close.

The mileage of the Southern Railway System is approximately 8,300 miles; the corporate mileage of the Southern Railway corporation is about 6,500 miles. The mileage of the Southern Railway System and the other lines that the Southern controls, including the Mobile, is about 9,500 miles. The mileage of the A. C. L., Louisville and Nashville System, is about 14,000 miles. This includes such lines as the Nashville-Chattanooga & St. Louis, and the Georgia Railroad and the other lines in which the Atlantic Coast Line is supposed to have an interest. The mileage of the Seaboard is approximately 4,500 miles; the Norfolk and Western, approximately 1,000 miles; the Georgia and Florida, approximately 600.

## STIPULATION AS TO STATEMENT OF EVIDENCE.

(443) The parties to the above entitled cause by their respective Attorneys, hereby stipulate and agree that the above and foregoing statement of the evidence is a true and complete statement of all the evidence adduced on the trial of said cause, and that the same may be approved by the Judge without notice. The parts of the testimony of the defendant's witness, Albert S. Richey, which appear in the form of questions and answers, have been incorporated in that form at the request of the plaintiffs. The parties stipulate and agree that in the event that the original exhibits in this case are, under the order of the Court, transmitted by the Clerk of this Court to the Clerk of the Circuit Court of Appeals, for the Fourth Circuit, at Richmond, Virginia, said original exhibits may be referred to and used by the parties on

the hearing of the appeal as fully as if the same were printed in the record.

This 21st day of October, A. D. 1931.

H. J. HAYNSWORTH,
R. S. HUTCHISON,
W. S. O'B. ROBINSON, JR.,
Attorneys for Defendant, Piedmont and Northern Railway Company.
NELSON THOMAS,
Attorney for Interstate Commerce Commission.
SIDNEY S. ALDERMAN,
Solicitor for Southern Railway Company.
F. B. GRIER,
Solicitor for Charleston & Western Carolina Railway.
CARL H. DAVIS,
Solicitor for Atlantic Coast Line Railroad Company.
WILLIAM C. BURGER,
Solicitor for Louisville & Nashville Railroad Company.
JAMES J. McLAUGHLIN,
Solicitor for Carolina, Clinchfield & Ohio Railway, Carolina, Clinchfield & Ohio Railway of South Carolina, and Clinchfield Northern Railway of Kentucky.

**ALLOWANCE OF STATEMENT OF EVIDENCE.**

(444) The foregoing statement of evidence is in all respects hereby approved and settled as a true and complete statement of all the evidence adduced on the trial of the above entitled cause. In addition to the transcript of the record the Clerk of this Court will transmit to the Clerk of the Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, all of the original exhibits in this case.

This, 28th day of October, A. D., 1931.

J. LYLES GLENN,
United States District Judge.

## SPECIAL FINDINGS OF FACT.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
(445) WESTERN DISTRICT OF SOUTH CAROLINA.

Interstate Commerce Commission, Southern Railway Company, Charleston & Western Carolina Railway Company, Atlantic Coast Line Railroad Company, Louisville & Nashville Railroad Company, Carolina, Clinchfield & Ohio Railway, Carolina, Clinchfield & Ohio Railway of South Carolina, and Clinchfield Northern Railway Company of Kentucky, Plaintiffs,

*vs.*

Piedmont and Northern Railway Company, Defendant.

In Equity No. 253.

The court upon the whole record makes the following special findings of fact. These special findings of fact are made and filed along with the conclusions of law based upon these findings of fact, and upon the separate opinion filed in this case. This is done in compliance with new equity rule 70½ as enunciated by the United States Supreme Court.

For convenience these special findings of fact are classified under seven main heads. It is obvious that several of the findings of fact come under two or more main heads, and in some cases the special findings of fact are repeated under more than one head. These major classifications are as follows:

(446) 1. Corporate History of the Piedmont and Northern Railway Company from early organization up to May 28, 1920, the date when paragraph 18 of Section 1 of the Transportation Act (49 U. S. C. A.) became effective.

2. The type of construction of the tracks, Bridges, road-bed, and terminals of the Piedmont and Northern Railway.

3. The rolling stock and other mobile equipment used by the Piedmont and Northern Railway Company.

4. An analysis of the traffic handled and the methods of operation.

5. The probable effect of the proposed extensions from Spartanburg, S. C., to Gastonia, N. C., and from Charlotte, N. C., to Winston-Salem, N. C., and of either one of these extensions.

6. The facts as to the threatened construction.

7. The History of the application by Piedmont and Northern Railway Company for a certificate of public convenience and necessity under the terms of the Transportation Act, paragraphs 19 and 20 (Title 49 U. S. C. A.) and the resulting judicial proceedings, heretofore had, in the District Court (three Judges sitting) under the terms of the urgent deficiencies Act, and the appeal to the United States Supreme Court.

## CORPORATE HISTORY OF THE PIEDMONT AND NORTHERN RAILWAY CO.

(447) 1. Defendant is a corporation chartered by act of the Legislature of South Carolina February 24, 1911, as a regular railroad, having all the powers of a railroad under the laws of that state, having full power of eminent domain of a railroad under the laws of that state, having power to operate by electricity or other motive power, but the charter act limiting its power to construct lines of railroad to the power to construct lines within the state of South Carolina. The charter provided, as to construction in South Carolina, "that unless said corporation shall enter and begin actual construction of its lines in any county into which it is empowered to enter, either expressly or under the general clause of this act, within ten (10) years after March 1st, 1911, all rights and franchises given to enter such county shall expire."

2. It owns and operates as a common carrier in intrastate and interstate commerce lines of electric rail-

road as follows: in South Carolina (its South Carolina Division) Greenwood to Spartanburg, 89.90 miles, Belton to Anderson, 11.30 miles, total main line miles 101.20; in North Carolina (its North Carolina Division) Gastonia to Charlotte, 23.50 miles, Belmont Junction to Belmont, 3.99 miles, total main line miles, 26.69; total main line miles of both divisions, 127.89. Of that main line mileage only 2.9 miles, or approximately 2.25 per cent, is located in streets and highways, the rest being built and operated on private right of way and going around rather than through the cities. In addition to main line mileage it has 37.24 miles of sidings and turnouts and 32.44 miles of miscellaneous spurs and indus-
(448) trial tracks. It operates under trackage rights over 16.79 miles of spur and industry tracks belonging to connecting interstate steam railroads or to industries.

3. The building of defendant's present lines was promoted by a group of men largely interested in hydro-electric power development and industrial development in the Piedmont section of the Carolinas, the leader of whom was the late James B. Duke. The Duke Power interests had already developed and put into operation in this territory one of the largest hydro-electric and auxiliary steam plant power developing systems and one of the largest power line transmission systems in the world. Mr. Duke and his associates were also heavily interested in textile, tobacco, and other industries of the piedmont sections of these states. And as part of their plans for further industrial development he and his associates promoted a scheme for building a line or a number of lines of freight carrying electric railroad, to be motivated by the electric power of the Duke Power Companies, and to render an extensive interstate freight service to industries in addition to rendering ordinary interurban service in local freight, passengers, baggage and express. The essence of the plan was to build a section or a particular line of railroad at a time, put it into operation, and then to undertake the building of other lines in the future at such times and between such points as circumstances might justify and as good judgment might dictate. There was a general intention and purpose from the beginning by such means ultimately to accomplish the building of a connected or continuous

line of electric railroad from some point of connection with the Seaboard Air Line Railway at Calhoun Falls, Abbebille or Greenwood in South Carolina northward through Greenville and Spartanburg, S. C., Gastonia and Charlotte, N. C., and thence by some undetermined route (449) to Durham, N. C., and there to connect with the Seaboard again and with the Durham and Southern, a steam railroad built and largely owned by Mr. James B. Duke and his brother Mr. B. N. Duke. The evidence shows that the general scheme was even more extensive than this; that the promoters from time to time gave consideration to extending railroad lines as far as Atlanta, Georgia, on the south, and Raleigh, N. C., on the north, and to the Atlantic seaboard in South Carolina.

4. The immediate object was to build into and tap very heavy and attractive industrial traffic concentrations in the piedmont of South Carolina generally between Anderson and Greenwood and Spartanburg and in the piedmont of North Carolina at and around Gastonia and between Gastonia and Charlotte; and to divert a substantial part of this freight traffic from steam railroads then carrying it, principally the interveners, to new interstate joint through routes to be formed by the projected electric lines to be built in each of those territories in connection with the interstate Seaboard Air Line System, the Seaboard at that time having no practicable access to the major part of these traffic concentrations.

5. In the prosecution of their general plans, the promoters first procured, on January 6, 1910, the charter under the laws of North Carolina of Piedmont Traction Company, chartered as a street railway corporation, with the limited powers of a street railway company, its powers to construct railway lines being expressly limited first to the state of North Carolina, and second to lines extending not more than 50 miles from Gastonia.

(450) 6. As the next step the promoters procured, on March 10, 1910, the charter under the laws of South Carolina of Greenville, Spartanburg and Anderson Railway Company, chartered as a street railway corporation, with limited powers of a street railway company,

its powers to construct railway lines being expressly limited to South Carolina and to lines between expressly fixed termini, Anderson on the south and Spartanburg on the north.

7. Before any lines had been constructed and put in operation by either of these companies, and to-wit, on December 9, 1910, those two corporations, Piedmont Traction Company and Greenville, Spartanburg and Anderson Railway Company, entered into an important traffic agreement with Seaboard Air Line Railway Company, to effect the purpose of creating new point through interstate routes in connection with that railroad over which to divert traffic from the other steam roads then serving those piedmont territories. That contract recited that the two companies "propose to construct a line or lines of standard gauge railway to be operated as a common carrier of both freight and passengers and to use steam, electricity, gasoline or other motive power, over the following routes", naming four proposed routes or lines: Route A, from Charlotte, N. C., through Mount Holly and Gastonia to King Mountain, N. C., connecting with the Seabord at Mt. Holly; Route B, from Spartanburg, S. C., through Greenville and Belton to a connection with the Seaboard at or near Calhoun Falls of Abbeville or Greenwood, including a line from Belton to Anderson; Route C, from a connection with Route B at or near Spartanburg, S. C., to a connection with Route A at (451) or near Kings Mountain, N. C.; and Route D, from Charlotte, N. C., through Greensboro, N. C., to a connection with the Seaboard at or near Durham, N. C., also connecting with the Seaboard at Charlotte. The proposed Route A was within the charter powers of Piedmont Traction Company to build. The portion of the proposed Route B from Anderson to Spartanburg was within the charter powers of Greenville, Spartanburg and Anderson Railway to build. But neither one nor both of said companies had any power under their charters to build the proposed Route C or the proposed Route D. The contract expressly provided that the contracting companies were in no way obligated to build either or any of said four proposed lines.

8. In the event of the future completion of any or

each of such proposed lines by the companies, the Seaboard, by the terms of the contract, agreed to open joint through routes and rates therewith and to grant to such line or lines highly favorable divisions, far in excess of the mileage proportion of haul; and the Seaboard agreed with the companies and the companies agreed with the Seaboard reciprocally each to make the lines of the other the preferred connection for the routing of unrouted freight traffic and each to influence to the fullest extent through solicitation and otherwise the routing of traffic so as to move over the lines of the other.

9. On January 10, 1911, the promoters entered into the Piedmont Syndicate Agreement covering the terms under which subscribers to the syndicate would subscribe to interests therein, and appointing and empowering managers of the syndicate. This agreement recited (452) the general purposes of the promoters, but in no wise settled or determined upon any particular construction, leaving all decisions as to the undertaking or abandonment of any part of the general scheme for railroad constructions to the uncontrolled and unreviewable discretion of the appointed managers. Among the powers sought by this agreement to be given to the managers by the subscribers was the choice of undertaking railroad construction in many counties in North and South Carolina entirely off the line and route of, and quite foreign to, the present lines and the presently threatened extensions. The managers had no actual power to construct lines of railroad except such as were procured from North Carolina in the charter of Piedmont Traction Company and from South Carolina in the charter of Greenville, Spartanburg and Anderson Railway Company. And the Syndicate Agreement by its own terms expired and terminated January 1, 1913, unless the managers should, with consent of a majority of the subscribers, extend the time for termination to not later than January 1, 1914. There is no evidence that the life of the agreement was extended beyond January 1, 1913. This agreement was not an undertaking to construct any particular line or lines of railroad.

10. The following month, February 24, 1911, the promoters, the managers of the syndicate, procured the

charter of the defendant, Piedmont and Northern Railway Company, as a regular railway corporation, under the South Carolina act referred to, and with charter powers limited as shown in finding No. I, sub-section 1, with (453) no power to construct any line of railroad in North Carolina, and the power to construct in South Carolina being subject to lapse March 1, 1921, as to any construction not actually begun before that date.

11. Piedmont Traction Company built the lines comprising the existing North Carolina Division, completed them and put them in full operation by July, 1912. It acquired the street railway system of Charlotte and trackage rights over the street railway system of Gastonia. The Piedmont Traction Company never undertook the construction of either of the present threatened extensions and it never had or acquired any charter power to undertake either or both such extensions. It never did any further construction work before it conveyed its properties to the present corporation, Piedmont and Northern Railway Company.

12. Greenville, Spartanburg and Anderson Railway Company acquired the line from Belton to Anderson, built the line from Greenwood first to Greenville and then on to Spartanburg, and acquired trackage rights over the street railway systems in Greenville and Anderson, thus completing the present South Carolina Division and exhausting its charter power to construct lines of railroad. These lines it at once put into full operation April, 1914. It never had or acquired any charter power to build north of Spartanburg or to build any pat of either present threatened constructions. It never undertook or did any further construction work before conveying its properties to the present corporation, Piedmont and Northern Railway Company.

(454) 13. By deed dated May 20, 1914, Piedmont Traction Company conveyed all its North Carolina railroad properties, the present North Carolina Division of defendant, including the street railway system in Charlotte and trackage rights over the street railway system in Gastonia, to defendant, Piedmont and Northern, which immediately with ownership took over operation thereof.

Piedmont Traction Company thereupon ceased to function.

14. By deed dated June 10, 1914, Greenville, Spartanburg and Anderson Railway Company transferred all of its properties in South Carolina, the present South Carolina Division, including the trackage rights over the street railway systems in Anderson and Greenville, to defendant, Piedmont & Northern Railway Company, which immediately with ownership took over operation thereof. Greenville, Spartanburg and Anderson Railway Company thereupon ceased to function.

15. By these transfers all the properties became merged into the corporate ownership and control of defendant corporation, chartered as a regular railroad, and it became the one chosen corporate instrumentality for the carrying out of any and all of the railroad ambitions, plans and purposes of the individual promoters. The Syndicate Agreement had expired and terminated by its own limitation.

16. Shortly after the transfer, to-wit, on July 1, 1914, the defendant executed a blanket mortgage to Farmers' Loan and Trust Company, covering all the (455) properties, in both states, authorizing the taking down of bonds to reimburse the stockholders of the two street railway companies for the property transfers and for other immediate corporate purposes, and also authorizing the future taking down from time to time of additional bonds up to a total of fifty million dollars, to provide for the future acquirement or construction of such additional line or lines of railroad as might be determined upon. This mortgage was not an "undertaking" to build or acquire any additional line or lines. Under the terms of the mortgage the Piedmont and Northern immediately took down about ten millions of dollars of bonds to cover the property transfers and for immediate corporate purposes and the only extent to which the mortgage was actually used was to secure the repayment of these bonds actually taken down. Up to the time of the close of the final hearing, beginning October 20, 1930, and ending November 1, 1930, defendant

had never taken down any further bonds under this mortgage.

17. Defendant did a small amount of preliminary surveying, between the time of the transfer of the properties to it and May, 1916, in reconnoitering for an extension of the Charlotte-Gastonia line to Kings Mountain, that is for the completion of the Route A referred to in the Seaboard contract. This surveying cost a total of $4,333.28. It stopped in May, 1916, and from that time nothing further was done looking toward any extension or further construction of lines and no further expenditures were made in connection with any extension or construction plan or project until 1925, five years after the time limit set by paragraph (18) of Section I of the Act. No expenditures were made for the acquiremnt of any (456) rights of way for ex- purposes until 1925.

18. Throughout a period of over ten years of nonaction, from May, 1916, and in fact from the time of its incorporation, February 24, 1911, a period of over fifteen years, up to November 3, 1926, neither the stockholders, the directors, nor the officers ever determined or decided upon the undertaking of any further extension or construction of lines, nor was there ever any corporate act looking toward or having any conection with any such extension or construction. It was in December, 1926, that the stockholders conferred definite authority upon the directors to determine upon or undertake any extension or further construction. No effort was made to acquire any corporate power under the law to build or construct any extension of lines or any new or additional line of railroad in North Carolina, and all such power was lacking, until February, 1927.

19. Defendant's lines and properties were taken over by the government and operated under Federal control until the termination of Federal control. It was one of six independently operated electric railroads in the United States so taken over.

20. Mr. Duke and the individual officers in charge of the defendant never abandoned the general plan or purpose to build further extensions and further to ex-

pand defendant's railroad. But all such plans and purposes remained tentative, subject to change and revision, and dependent for actual determination and decision on future conditions. Any determination or decision to un-
(457) dertake any definite extension or further construction was indefinitely postponed because of the unsettlement of conditions caused by the outbreak of the World War, the entrance of the United States into the War, Federal Control, and the poor state of defendant's lines and properties upon their return after Federal Control.

21. Such was the history of the defendant corporation up to the date when Transportation Act 1920 was passed and took effect February 28, 1920.

## II.

## (458) CONSTRUCTION, TRACKS, BRIDGES, ROADBED, TERMINALS.

1. Defendant's present lines of railroad were originally built, and are now, of standard gauge, standard railroad construction. They were built as higher class railroad lines than the Southern Railway Company's lines in the same territory at that time. A heavy and expensive type of construction was adopted with a view to the handling of substantial interchange freight traffic in connection with steam railroads of the territory. Maximum grades of one per cent in each direction, compensated for curvature at the rate of .04 feet per degree, were adopted, the same as the ruling grades of the Southern and the Seaboard in the same territory. Eighty pound rail was used and has been maintained in excellent condition. To accomplish the said grading and to adapt the lines to heavy freight traffic extensive cuts and fills, of steam railroad standard, were used. The roadbed, ballast, crossties, turnouts and switches, culverts and drainage and trestles are all of standard single-track steam railroad constructon and excellently well maintained. The trestles and bridges were built according to Standard Railway Specifications and standards. The sharpest curvatures are 8 degrees on main line, and 12 degrees approaching terminals, which are less than

corresponding curvatures on Southern Railway. The sharpest curvatures on spur and industrial tracks are much less than corresponding curvatures on Southern, Louisville and Nashville and other steam roads of the territory. Certain differences in construction exist which are incident to the use of electricity as motive power (459) rather than steam. Coal chutes and water tanks are absent. The rails are bonded for electrical transmission. Overhead power is conveyed by catenary type trolleys supported on double standards, rather than by trolleys of the ordinary street car type. It has electric substations along its lines for power and it operates on 1,500 volt direct current.

2. It proposes to use 100 pound rail on its proposed extensions and to build its bridges on Standard Railway double track standards, looking to expansion of its interchange freight traffic.

(460) III.

## MOBILE EQUIPMENT, ROLLING STOCK, USED BY PIEDMONT AND NORTHERN RAILWAY COMPANY.

1. With the exception of its electric locomotives and its passenger cars, the rolling stock equipment of the defendant is standard steam railroad equipment. It has 17 electric locomotives, ranging from 55 tons weight and 800 tons tonnage rating to 100 tons weight and 1,350 tons tonnage rating. It has 19 passenger cars, 17 of which are equipped with self-contained motor units, and 2 of which are trailers, without motors. It has 287 freight cars, which have no electrical equipment and are exactly the same as steam railroad freight cars, identical in equipment, brakes, safety appliances, automatic couplers and other devices. An official or business car, also interchangeable, makes 288 cars interchangeable with steam railroads. They move constantly and freely over steam railroads all over the United States, and foreign line freight equipment of every character from the whole country moves constantly and freely over the lines of the defendant. As of December 31, 1929, the total investment in equipment since June 30, 1914, was

$778,194.11, and of that total, $674,803.04, approximately 85 per cent, represented expenditures for locomotives and interchangeable freight cars, equipment used exclusively in freight carriage. The electric locomotives are not used for passenger service, but only for freight. The defendant has freight yards at Charlotte (Pinoca), Spartanburg, and Greenville, which, in construction and equipment are essentially the same as standard steam railroad yards. At Greenwood, the freight yard and terminal is a joint facility with Seaboard and Georgia and (461) Florida, steam roads, and of course is a standard steam railroad terminal. It is operated by the Seaboard for all three roads, the defendant interchanging with the two steam roads over the joint facility by means of the Seaboard's steam switching engines. A peculiarity of electric motive power is that the same locomotives are used both for switching service and for line haul. The added power necessary for heavy trains in line haul is secured by doubling the locomotives, which practically doubles the power, and hence defendant finds it unnecessary to have very large or heavy individual locomotives for line haul. Its locomotives are considerably lighter than the heaviest electric locomotives employed on electrified portions of such steam railroads as the Virginian, the Pennsylvania, etc., but they are fully adequate to carry the traffic which the defendant has to carry. By doubling, its locomotives draw as many as 65 freight cars, and trains of 40 to 45 cars are quite usual.

2. The photographs introduced in evidence by plaintiffs and defendant correctly represent the rolling stock of the Piedmont and Northern Railway Company. One photograph introduced by the defendant also correctly represents typical through passenger train of a major steam railroad.

(462)

## IV.

## AN ANALYSIS OF THE TRAFFIC HANDLED AND THE METHODS OF OPERATION.

1. Defendant's local passenger business is handled in the method of what is ordinarily known as street, suburban and interurban passenger business, in street-

car type cars, having self-contained motor units, sometimes with a trailer, but never more than two cars being operated together. It does not operate passenger trains of several cars. But as to part of its passenger business, the defendant has entered an interstate and national field. It has operated a through Pullman schedule with the Seaboard. It is a member of the Southeastern Passenger Association, publishes and sells passenger fares to points all over the country, to and from which steam carriers of the territory sell passenger fares. It sells winter tourist tickets, convention tickets, tickets to Havana, Cuba, excursion tickets to Norfolk, Washington, and Northern points in connection with steam roads, and it checks baggage on passenger tickets to points all over the country. It interchanges passengers on through interstate tickets, but does not interchange passenger cars. In its freight business it interchanges not only freight in interstate through transportation, but loaded freight cars.

2. Its operating methods for the handling of its freight business are indistinguishable from those of single track steam railroads of the territory, except as to such differences as are merely incidental to electric motive power. Its operating rule book is substantially similar to the rule book of Southern Railway Company, (463) except as to such differences in the Southern rule book as are occasioned by its double track operation, and such differences in the defendant's rule book as are caused by electric motive power. Defendant operates through freight trains and local freight trains in substantially the same manner as the steam railroads. Its trains are operated under train orders, clearance cards, meet orders, changes in orders, rules as to superior and inferior trains, air brakes, hand brakes, train protection, and many other details just as are trains of steam roads. Its signal system is not of such high class as the systems employed on the longer lines of the steam railroads of the territory, defendant using a selector semaphore system. However, some of the steam railroads use systems based on the same principle. Defendant serves industries directly from its lines and industrial tracks, over industrial tracks belonging to the industries, and over industrial tracks belonging to steam railroads,

in substantially the same manner as is done by steam railroads. The industries load solid cars to distant break-bulk points, which are picked up and given line haul by the defendant, and by it delivered to connections and expedited to the particular break-bulk point, in substantially the same manner as the steam roads. The incoming freight from distant points comes in by steam railroad connections of the defendant, to its freight houses, and is distributed by the defendant in substantially the same way as by steam railroads. It operates regularly scheduled daily freight package cars in connection with steam railroads from the following points in the respective days moving time from origin to destination; from Atlanta, Ga., 3 days; Baltimore, Md., 3 (464) days; Birmingham, Ala., 5 days; Boston, Mass., 5 days; Charleston, S. C., 4 days; Charlotte, N. C., 1 day; Chattanooga, Tenn., 3 days; Chicago, Ill., 4 days; Cincinnati, Ohio, 4 days; Louisville, Ky., 5 days; Nashville, Tenn., 4 days; New Orleans, La., 6 days; Norfolk, Va., 2 days; Philadelphia, Pa., 3 days; Portsmouth, Va., 2 days; Providence, R. I., 5 days; Richmond, Va., 2 days; St. Louis, Mo., 4 days. This package car service is in connection not only with interstate steam railroads, but with ocean steamship lines.

3. Defendant's methods of business solicitation, its membership in traffic organizations, and its tariffs, published and concurred in, are national in scope. It maintains an extensive traffic organization competing for traffic throughout the United States wherever the defendant can secure a haul, either as originating, delivering or intermediate carrier. It maintains a Traffic Manager at Greenville, an Assistant Traffic Manager at Cincinnati, a General Freight and Passenger Agent at Greenville, an Assistant General Freight Agent at Greenville, a Division Freight Agent at Charlotte, and Commercial Agents at Charlotte, Gastonia, Anderson, Greenville, Cincinnati, Spartanburg and Atlanta, a Division Passenger Agent at Greenville, and a General Eastern Agent at New York City. Its Traffic Manager at Greenville, its Assistant Traffic Manager at Cincinnati, its General Eastern Agent at New York City, and its Commercial Agents at Cincinnati and Atlanta, are joint employees representing the defendant and Durham

and Southern, a steam railroad engaged in interstate
(465) commerce, owned by interests closely affiliated with those owning defendant. It is a member of American Railway Association, Railway Accounting Officers' Association, Railway Treasury Officers Association, Southern Association of Car Service Officers, Southern Claims Conference, Traffic Club of New York, Association of Railway Executives, Southern Freight Association, Southern Weighing and Inspection Bureau, Southeastern Demurrage and Storage Bureau, all regular steam railroad traffic associations. It has membership on both the General Committee and the Executive Committee of the Southern Freight Association, with vote on each committee and in the Association equal to the vote of any member interstate steam road. It has a regular contract with Railway Express Agency, Inc., successor to American Railway Express Company. It is a member of the Per Diem Agreement of steam railroads governing interchange of freight equipment. It repairs foreign line cars on its own lines, and foreign line steam railroads repair its cars on their lines. It publishes and files 17 general individual tariffs under I. C. C. serial numbers of its own; it is a party as initial carrier to 184 general tariffs published by various official tariff publishing agents and filed with the Commission. It is a participating carrier in 364 published tariffs under powers of attorney given by it to the publishing steam railroads. The scope of its tariffs embraces the entire country, from the Atlantic to the Pacific coast, and from Mexico and the Gulf to Canada. Some of the tariffs concurred in by it as initial carrier in fact cover Canadian points and Mexican points. From a tariff standpoint, it has the power, by changes in its own tariffs, to affect the tariffs and rates of steam railroads
(466) all over the United States. From 1916 to April 1, 1930, it has filed 303 proposals with the Southern Freight Association for rate changes to and from points all over the United States.

4. From the beginning of the operation of the present lines, freight revenues have been large and have almost constantly increased; while passenger revenues, although in the first few years substantial, have progressively decreased. For the first full year's operation of

the present lines by the Piedmont Traction Company and Greenville, Spartanburg and Anderson Railway Company, the year ending June 30, 1914, total freight revenues of the two companies were $496,772.39, while total passenger revenues of the two companies were $324,045.21. For the first year's operation of present lines by defendant, its freight revenues were $549,426.00, as against its passenger revenues of $336,466.66. From that year, freight revenues have shown an almost constant progression until they amounted to $2,340,809.58 for the year ending December 31, 1927, and $2,317,528.77 for the year ended December 31, 1929. Its passenger revenues also increased to a maximum of $871,775.17 for the year ended December 31, 1918. That was the one year throughout the history of operations by the defendant in which passenger revenues exceeded freight revenues, this condition being caused by the location of large army camps on and near its lines during the war. Since that year, its passenger revenues have progressively decreased until they amounted to only $124,159.28 for the year 1927, $108,279.18 for the year 1928, and only $71,562.72 for the year 1929. Since 1918, and increasingly for later years, freight business of national importance, (467) interchanged with connecting steam roads, has been the wholly predominant part of defendant's business. For the year 1927, its freight revenues were 92.8 per cent of total revenues, and its passenger revenues 4.9 per cent. For 1928, its freight revenues were 93.1 per cent, and its passenger revenues were 4.6 per cent of total revenues. For 1929, freight revenues were 94.5 per cent, and passenger revenues 2.9 per cent of total revenues. For the first three months of 1930, freight revenues were 95.7 per cent, and passenger revenues 1.8 per cent of total revenues.

5. A very small part of defendant's freight business and of its total revenues comes from transportation of local freight, and the predominant part comes from interchange of freight with interstate steam railroads. For the year 1927, of total freight revenues, 5.9 per cent were from local freight, and 94.1 per cent from interline interchange freight. For 1928, 4.5 per cent was from local freight, and 95.5 per cent from interline interchange freight. For 1929, 4.3 per cent was from

local freight, and 95.7 per cent from interline interchange freight, and the same relations exist for the first three months of 1930.

6. The reverse is true as to defendant's passenger revenues, which in themselves have now become of only minor importance. For 1927, 97.5 per cent of passenger revenue were local revenues, and 2.5 per cent interline revenues. For 1928, the proportions were 97.8 per cent local and 2.2 per cent interline. For 1929, the proportions were 97.8 per cent local, and 2.2 per cent interline. (468) For the first three months of 1930, the proportions were 97.7 per cent local, and 2.3 per cent interline.

7. Since 1916, defendant has been in the millionaire class, a class 1 railroad, its operating revenues for that year and ever since amounting to more than $1,000,000.00 annually. Since 1923, they have amounted to more than $2,000,000.00 annually. For 1927, its total revenues were $2,523,092.42, of which $2,340,809.58 came from freight. For 198, its total revenues were $2,346,513.05, of which $2,185,110.36 came from freight. For the year 1929, its total revenues were $2,451,992.34, of which $2,317,528.77 came from freight.

8. Dividing its freight revenues as between revenues from intrastae freight and revenues from interstate freight, the following are the percentages: From 1927, 89 per cent of freight revenues came from interstate freight, and 11 per cent from intrastate freight; for 1928, 82.1 per cent was interstate, and 17.9 per cent intrastate; for 1929, 80.7 per cent was interstate and 19.3 per cent intrastate. For the first three months of 1930, 78.9 per cent was interstate and 21.1 per cent intrastate. The intrastate freight revenues referred to include freight interchanged with steam railroad connections but originating at and destined to points within the same state.

9. The powerful and continuing effect of the traffic agreement with the Seaboard Air Line is shown by the facts as to carload interchange traffic of the defendant received from and delivered to its four principal steam

railroad connections, the Seaboard, the Southern, the Charleston and Western Carolina, and the Clinchfield. (469) In 1927, it interchanged a total of 71,643 carloads of freight with these steam connections, of which the Seaboard's interchange was 55,594 carloads, or 77.6 per cent of the total. In 1928, it interchanged with these connections a total of 69,404 carloads, of which the Seaboard's interchange was 54,477, or 78.5 per cent. In 1929, it interchanged a total of 73,250 carloads, of which the Seaboard's interchange was 56,048 carloads, or 76.5 per cent of the total. For the first three months of 1930, it interchanged a total of 17,749 carloads, of which Seaboard's interchange was 13,404 carloads, or 75.5 per cent of the total. There is more than one loaded car of freight each day on defendant's line for every passenger carried. Its average interchange of carload freight with steam railroads of the territory is approximately 6,000 carloads per month. It forwards carloads of freight from its own lines to destinations in all parts of the United States, and to some parts of Canada and Mexico, and it likewise receives carloads of freight from origins in all parts of the United States. Under the Per Diem Agreement, for one specimen month, the month of February, 1930, it received, at the rate of $1.00 per car per day, a total of $5,814.00 in payments from foreign lines for use of defendant's freight equipment moving over such foreign lines, and the paying foreign lines comprise almost all of the important railroads of the United States, and also Canadian National Railway. For the same month, defendant paid to foreign lines for the use of their equipment on defendant's lines, under the same Per Diem Agreement, a total amount of $16,659.12, the lines to which such payments were made including practically all of the important steam railroads of the United Staes, and in addition forty private car (470) lines, whose tank cars, refrigerator cars, etc., move over the defendant's lines.

10. The immediate effect of the beginning of the operation of the present lines of the defendant under the provisions of the traffic agreement with the Seaboard Air Line and the joint through routes opened up to it by that steam railroad under the said agreement was the diversion of a very substantial freight traffic of the pied-

mont section of North and South Carolina from the steam railroads which had been carrying such traffic to the new joint through routes formed by the lines of the defendant and the lines of railroad of Seaboard Air Line. The defendant has also many joint through routes with other connecting steam railroads than Seaboard Air Line. In connection with the Seaboard, its joint through routes reach Portsmouth, Va., and by steamship lines reach Baltimore, New York, Philadelphia and the Northeast and New England, foreign export and import; Norfolk, Va., the Pennsylvania Railroad and its connections, Portsmouth, Va., the Norfolk and Western and its connections; and Richmond, Va., Chesapeake and Ohio Railway and its connections. These through routes with Seaboard make it a part of through trunk line routes to and from the entire Northeast and New England territory and foreign commerce. To the southward, defendant's lines are connecting lines in joint through trunk line routes to Birmingham, Ala., and Montgomery, Ala., Memphis, Tenn., and Vicksburg, Miss., and New Orleans, La., and thence to the entire western and northwestern transportation system of the United States. Defendant is a link in joint through routes to the north
(471) and west by Seaboard to Bostic, and thence by Clinchfield, Norfolk and Western, Chesapeake and Ohio and other connections. Since the Norfolk Southern built into Charlotte, defendant has been a link in joint through routes to all of the territory served and reached by that railroad. Defendant in addition has joint through routes with Southern, and all the territory reached by it and its connections, leading to all parts of the United States.

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V.

## THE PROBABLE PROJECT OF PROPOSED EXTENSIONS.

1. If defendant's threatened extensions, or either of them, should be built, new and important joint through routes would be opened up to it. If both threatened extensions should be built, it would connect with Georgia and Florida, a steam railroad, at Greenwood on the south, and with Norfolk and Western, a steam railroad, at Winston-Salem on the north, and would thereby be-

come the interior connecting link in a new through route and effective trunk line of connecting carriers leading from Florida on the south throughout the Southeast and to the northern gateways reached by the Norfolk and Western, and in the reverse direction. This new joint through route and effective additional trunk line would furnish a very direct route, strongly competitive with the existing trunk lines of the territory. If only the threatened connecting link should be built, the same result would obtain, except that the route from Charlotte to Winston-Salem and the connection there with Norfolk and Western would not be directly over the defendant's own lines, but would be over a joint route formed by Norfolk Southern to Norwood, and Winston-Salem Southbound to Winston-Salem, to the connection with Norfolk and Western. In such event the defendant would have its continuous line between Greenwood, S. C., and Charlotte, N. C., as the interior link in joint through routes from Florida to the northern gateways reached by the Norfolk and Western, and in the reverse direction. In addition, even if only the threatened connecting link should be built, the defendant would become a link in new joint through routes from all of the territory (473) reached by the extensive Central of Georgia system, and by the Georgia and Florida, to Augusta, Georgia, and Florida to Greenwood, Piedmont and Northern by continuous line to Charlotte, Norfolk Southern to Norfolk, Pennsylvania Railroad and steamship lies to all territories reached by them, and in the reverse direction.

2. Defendant, at the final hearing, offered in evidence no estimate as to what new business would be gained by it and diverted from steam railroads by the building of its extensions. The best estimate in the record is that made by the defendant in its application and its returns to the Interstate Commerce Commission seeking certificate for the construction of the now threatened extensions. It there showed that it would gain, by the construction of these extensions, new business, diverted from the steam railroads, of 82,320 cars a year, including 12,300 cars of bridge traffic carried entirely over its lines as the interior connecting link in the aforesaid joint through routes, with a gain to itself of total new

revenues of $3,890,016.57 for the first year, and that this would be progressively increased at the rate of 8.4 per cent for each year thereafter, reaching $5,822,344.01 additional revenues the sixth year, and thereafter increasing on substantially the same yearly basis of increase. By reason of the fact that they would lose a longer haul on such diverted traffic than the defendant would gain, the interveners' witnesses estimate that the loss of revenues to the interveners which would result from the building of defendant's threatened extensions would be at least twice the revenues to be gained by defendant. (474) In any event, defendant's threatened extensions would divert very substantial freight revenues from the interveners running into millions of dollars annually, all to their irreparable injury.

3. The Louisville and Nashville and the Atlantic Coast Line, under authority from the Interstate Commerce Commission, have leased the Clinchfield lines at large financial obligation, and the Louisville and Nashville has now constructed and practically completed, under certificate of public convenience and necessity of the Interstate Commerce Commission, at a total final cost of over five millions of dollars, a new cut-off line from Harlan County coal fields to create a new direct route via Louisville and Nashville lines and Clinchfield lines to the territories here involved. It assumed these obligations and expenditures before it learned that defendant threatened to build its extensions to connect with Norfolk and Western. The building of such extensions would create a new through route from the coal fields on the Norfolk and Western via its lines and the extended Piedmont and Northern lines, directly competing with and diverting traffic from the new through routes of the Louisville and Nashville authorized by the Commission.

4. Defendant is owned and controlled by Duke Endowment Trust, created by the late James B. Duke, and by closely allied trusts created by his will, and the same interests own the extensive Duke Power Company, which owns the hydro-electric development and transmission systems of the territories here involved, and which also owns the electric utility properties in a num-

ber of cities and towns of the piedmont sections of North
(475) and South Carolina. These owning interests, at the time of the application to the Commission for a certificate for these threatened extensions, intended to locate new power steam plants on the lines of such extensions to the end that the defendant might get the haul on coal traffic moving to such steam plants. The Duke Power Company is interested in warehouses and various mercantile and industrial concerns in the Piedmont territory. The defendant itself owns warehouses in Charlotte, Gastonia, Spartanburg, Greenville and Anderson, which it rents to shippers and receivers of freight with contracts for freight preference. The Duke Power Company in itself and through other power companies, utility companies, mercantile and other interests owned by it, is a very large shipper and receiver of freight throughout these *peidmont* sections. The shipments of coal alone to the Duke Power Company steam plants is enormous. It is able to control and does control the routing of its own traffic. It favors the defendant's lines in such routing. The defendant's lines and the lines of the Durham and Southern have constantly been favored in the routing of freight traffic which could be controlled by Duke Power Company and the other allied Duke interests. By reason of its ownership and control by those interests, which also have a large control over the routing of freight traffic of the territory, defendant has a competitive power in the field of national traffic which it would not otherwise have. The intervening steam railroads have felt sharply the effects of this control of traffic in favor of the defendant.

5. The statistics show that the overwhelmingly predominant part of defendant's business is interchange
(476) interstate freight traffic of national character and scope, essentially the same, and in all essential respects conducted the same, as the business of the interstate steam freight carriers of the territory. Such differences in construction, equipment, operations and methods of handling as exist are purely incident to the use of electrical motive power instead of steam. Its purely local traffic in freight, passengers, baggage and express is so small as to be relatively inconsequential. The probable effect of the proposed extensions, either

one or both, would be a substantial gain in interchange interstate freight traffic of national importance. The purely local traffic in freight, passengers, baggage and express to be gained by the construction of said extensions would also be so small as to be relatively inconsequential, and alone would in no wise financially justify the expenditure required. It is the national, rather than the local business of defendant which would be substantially augmented by the threatened extensions.

(477)

## VI.

## THE FACTS AS TO THE THREATENED CONSTRUCTION.

1. Defendant is undertaking and threatens to construct, and when constructed to operate, as a common carrier in intrastate and interstate commerce, without first having procured from the Interstate Commerce Commission a certificate of public convenience and necessity under paragraph (18) of section 1 of the Interstate Commerce Act as amended by Transportation Act 1920 (U. S. Code, title 49, section 1, par. (18)), two certain extensions of its lines of railroad, to be similarly electrically operated, to-wit: an interstate line from Spartanburg, S. C., to Gastonia, N. C., of approximately 53 miles to connect its existing lines in South Carolina with its existing lines in North Carolina; and a line from Charlotte, N. C., from its present northern terminus at Charlotte to Winston-Salem, N. C., of approximately 75 miles. The total mileage of both threatened extensions would be approximately 128 miles of main line, besides sidings and turnouts, team, switching, spur and industry tracks in about the same ratio as on existing lines. The extensions, if built, would therefore double defendant's existing main line mileage, giving it a continuous line of railroad from Greenwood, S. C., to Winston-Salem, N. C., of approximately 255.89 miles.

2. On March 11, 1930, defendant started actual construction work at Spartanburg, S. C., and at Gastonia, N. C., on the threatened Spartanburg-Gastonia extension under resolutions of its board of directors of March 10, 1930, directing its officers to proceed toward the com-

pletion of its lines of railroad according to an announced plan for the construction of both extensions, by forth-
(478) with constructing the connecting line from Spartanburg to Gastonia. This actual construction work stopped when this suit was brought but defendant has announced its intention to build both extensions unless enjoined herein. At this time, however, the construction of the connecting link between Spartanburg, S. C., and Gastonia, N. C., has alone been specifically authorized by the Board of Directors. No such authorization exists for the Charlotte-Winston-Salem Extension.

3. The building of defendant's present lines was promoted by a group of men largely interested in hydro-electric power development and industrial development in the piedmont section of the Carolinas, the leader of whom was the late James B. Duke. The Duke Power interests had already developed and put into operation in this territory one of the largest hydro-electric and auxiliary steam plant power developing systems and one of the largest power line transmission systems in the world. Mr. Duke and his associates were also heavily interested in textile, tobacco, and other industries of the piedmont sections of these states. And as part of their plans for further industrial development he and his associates promoted a scheme for building a line or a number of lines of freight carrying electric railroad, to be motivated by the electric power of the Duke Power Companies, and to render an extensive interstate freight service to industries in addition to rendering ordinary interurban service in local freight, passengers, baggage and express. The essence of the plan was to build a section or a particular line of railroad at a time, put it into opera-
(479) tion, and then to undertake the building of other lines in the future at such times and between such points as circumstances might justify and as good judgment might dictate. There was a general intention and purpose from the beginning by such means ultimately to accomplish the building of a connected or continuous line of electric railroad from some point of connection with the Seaboard Air Line Railway at Calhoun Falls, Abbeville or Greenwood in South Carolina northward through Greenville and Spartanburg, S. C., Gastonia and Charlotte, N. C., and thence by some undetermined

route to Durham, N. C., there to connect with the Seaboard again and with the Durham and Southern, a steam railroad built and largely owned by Mr. James B. Duke and his brother, Mr. B. N. Duke. The evidence shows that the general scheme was even more extensive than this; that the promoters from time to time gave consideration to extending railroad lines as far as Atlanta, Georgia, on the south, and Raleigh, N. C., on the north, and to the Atlantic seaboard in South Carolina.

4. Before any lines had been constructed and put in operation by either of these companies, and to-wit, on December 9, 1910, those two corporations, Piedmont Traction Company and Greenville, Spartanburg and Anderson Railway Company, entered into an important traffic agreement with Seaboard Air Line Railway Company, to effect the purpose of creating new joint through interstate routes in connection with that railroad over which to divert traffic from the other steam roads then serving those piedmont territories. That contract recited that the two companies "propose to construct a line or lines of standard gauge railway to be operated as a common carrier of both freight and passengers and (480) to use steam, electricity, gasoline or other motive power, over the following routes," naming four proposed routes or lines: Route A, from Charlotte, N. C., through Mount Holly and Gastonia to Kings Mountain, N. C., connecting with the Seaboard at Mt. Holy; Route B, from Spartanburg, S. C., through Greenville and Belton to a connection with the Seaboard at or near Calhoun Falls or Abbeville or Greenwood, including a line from Belton to Anderson; Route C, from a connection with Route B at or near Spartanburg, S. C., to a connection with Route A at or near Kings Mountain, N. C.; and Route D, from Charlotte, N. C., through Greensboro, N. C., to a connection with the Seaboard at or near Durham, N. C., also connecting with the Seaboard at Charlotte. The proposed Route A was within the charter powers of Piedmont Traction Company to build. The portion of the proposed Route B from Anderson to Spartanburg was within the charter powers of Greenville, Spartanburg and Anderson Railway to build. But neither one nor both of said companies had any power under their charters to build the proposed Route C or

the proposed Route D. The contract expressly provided that the contracting companies were in no way obligated to build either or any of said four proposed lines.

5. In the event of the future completion of any or each of such proposed lines by the companies, the Seaboard, by the terms of the contract, agreed to open joint through routes and rates therewith and to grant to such line or lines highly favorable divisions, far in excess of the mileage proportion of haul; and the Seaboard agreed with the companies and the companies (481) agreed with the Seaboard reciprocally each to make the lines of the other the preferred connection for the routing of unrouted freight traffic and each to influence to the fullest extent through solicitation and otherwise the routing of traffic so as to move over the lines of the other.

6. Shortly after the transfer, to-wit, on July 1, 1914, the defendant executed a blanket mortgage to Farmers' Loan and Trust Company, covering all the properties, in both states, authorizing the taking down of bonds to reimburse the stockholders of the two street railway companies for the property transfers and for other immediate corporate purposes, and also authorizing the future taking down from time to time of additional bonds up to a total of fifty million dollars, to provide for the future acquirement or construction of such additional line or lines of railroad as might be determined upon. This mortgage was not an "undertaking" to build or acquire any additional line or lines. Under the terms of the mortgage the Piedmont and Northern immediately took down about ten millions of dollars of bonds to cover the property transfers and for immediate corporate purposes and the only extent to which the mortgage was actually used was to secure the repayment of these bonds actually taken down. Up to the time of the close of the final hearing, beginning October 20, 1930, and ending November 1, 1930, defendant had never taken down any further bonds under this mortgage.

7. Defendant did a small amount of preliminary surveying, between the time of the transfer of the properties to it and May, 1916, in reconnoitering for an extension

of the Charlotte-Gastonia line to Kings Mountain, that (482) is for the completion of the Route A referred to in the Seaboard contract. This surveying cost a total of $4,333.28. It stopped in May, 1916, and from that time nothing further was done looking toward any extension or further construction of lines and no further expenditures were made in connection with any extension or construction plan or project until 1925, five years after the time limit set by paragraph (18) of Section I of the Act. No expenditures were made for the acquirement of any rights of way for extension purposes until 1925.

8. In 1924 the defendant's directors began to urge Mr. Duke to discontinue dividends and to decide upon construction of a connecting link between the North Carolina and South Carolina divisions of its lines and the public and the officers made considerable efforts to induce him to decide also to build a northern extension, not to Durham to a connection with Seaboard and Durham and Southern, but to Winston-Salem to a connection with the extensive Norfolk and Western.

9. Mr. Thomason, the Vice-President and General Manager, negotiated with Winston-Salem Southbound for purchase, part purchase, or acquirement of trackage rights over its line, during the period from August 26, 1925, to February 18, 1927. The Southbound had and now has a line of steam railroad, which it operates as a common carrier in intrastate and interstate commerce, extending from Winston-Salem, N. C., where it connects with Norfolk and Western and with Southern Railway, and running southwardly through Lexington to Norwood, a connection with Norfolk and Southern and to Wadesboro, N. C., a connection with the Seaboard. The (483) Southbound was and is owned jointly, 50 per cent each, by Norfolk and Western and Atlantic Coast Line. Mr. Thomason negotiated in the alternative for purchase of a one-third stock *interests* in the Southbound, or for purchase of the half interest of either Norfolk and Western or Atlantic Coast Line, or for contract for trackage rights. His idea was, by one of these arrangements, to induce Mr. Duke and the directors to undertake a northern extension only to Lexington and to reach Winston-Salem and the Norfolk and Western over the steam line

of the Southbound by adapting it to electrical operation. The stock purchase suggestion was turned down by the Southbound on September 18, 1925, and after extensive correspondence and negotiation the suggestion of securing trackage rights was turned down by the Southbound on February 18, 1927.

10. Mr. James B. Duke died in the meantime, in October, 1925, without having personally ever finally decided or determined upon any extension of lines or further construction and without having called for any authority from stockholders or directors to that end.

11. The first definite corporate act looking to the undertaking of any extension or new construction was a resolution adopted by the directors on November 3, 1926, after Mr. Duke's death, calling a meeting of stockholders and recommending that the stockholders confer authority and discretion upon the directors to undertake extensions and further constructions as the directors might deem advisable. This the stockholders did by resolution at a special meeting on December 8, 1926.

(484) 12. All power of defendant to construct any lines of railroad in South Carolina lapsed by inaction on March 1, 1921, and for a period of nearly six years no such power existed in the corporation. At the meeting of November 3, 1926, the directors recommended and at the meeting of December 8, 1926, the stockholders authorized and directed the procuring of an act of the legislature of South Carolina to re-confer this lapsed power. And an amendatory act was procured, enacted January 27, 1927, remedying this lapse of power.

13. The defendant never having procured any charter power or any power under the laws of North Carolina to construct any lines in North Carolina, it then procured an act of the General Assembly of North Carolina, ratified February 21, 1927, which purported to confer power upon "any electric interurban railway company, whether organized under the laws of this or any other state" to "construct, maintain and operate electric interurban railways and engage in business in this state" provided that "any such company, when organized un-

der the laws of another state, shall operate no part of its line of railway in this state by steam motive power or as a part of a general steam railroad system of transportation". This act manifestly referred to the Piedmont and Northern Railway Company.

14. Pursuant to the authority and discretion conferred upon them by the stockholders' resolution of December 8, 1926, the directors never decided, determined to undertake or authorized the officers to undertake any extension or construction without having first procured from the Interstate Commerce Commission a certificate (485) of public convenience and necessity under paragraph (18) of the act until March 10, 1930. On March 21, 1927, they authorized the officers to apply to the Commission for such certificate for the construction and operation in interstate commerce of the connecting link extension from Spartanburg to Gastonia and of a northern extension from Charlotte to Winston-Salem. This the officers did, filing the application March 26, 1927.

15. Thereafter, on March 10, 1930, the directors adopted the resolutions referred to in finding No. VI, Sub-Section 2, and which is as follows:

"RESOLUTIONS ADOPTED AT SPECIAL MEETING OF BOARD OF DIRECTORS OF PIEDMONT AND NORTHERN RAILWAY COMPANY, HELD AT GREENVILLE, SOUTH CAROLINA, ON MARCH 10, 1930.

"Mr. W. S. Lee, the President of the Company, stated that the meeting had been called for the purpose of discussing with the Directors the opinion the United States Supreme Court delivered February 24, 1930, in the case of Piedmont and Northern Railway Company v. United States, Interstate Commerce Commission, Southern Railway Company, and others involving the Company's right to complete its lines, and of advising with the Directors about the steps to be taken in view of the decision and opinion of the court. He laid before the Board a copy of the opinion, and stated that he was advised by counsel of the company that the decision of the court does not determine the Company's right to proceed with the completion of its lines, but leaves this

question for future determination in the event the right to complete the lines should be further denied and contested. He called attention to the statement in the opin-
(486) ion that the right of the Company to proceed with the proposed construction is not affected or controlled by the ruling of the Interstate Commerce Commission in its report of April 3, 1928, and read to the Board the following language from the opinion:

"Neither the assumption of jurisdiction by the Commission nor its denial of the application can operate as *res judicata* of the railway's claim of immunity. If, as is contended, the Commission was without jurisdiction, the railway is as free to proceed with the construction as if the application had not been made and the Commission had not acted. Nothing done by the Commission can prejudice the railway's claim to immunity in any other proceeding."

"The matter was thereupon thoroughly discussed in detail by all of the Directors present.

"Upon motion of Capt. E. A. Smyth, duly seconded by Mr. A. F. McKissick, the following resolution was unanimously adopted:

'BE IT RESOLVED, That the completion of the lines of the company as the same were originally projected and planned to extend through the Piedmont section of North and South Carolina from Greenwood and Anderson on the South, to Durham and Winston-Salem on the North, not be abandoned, and said original plan and project is hereby reaffirmed and approved.'

"Upon motion of Mr. J. P. Gossett, duly seconded by Mr. J. H. Separk, the following resolution was unanimously adopted:

'BE IT RESOLVED, That the officers of the company be, and they hereby are, directed and instructed to proceed toward the completion of the lines of the company as originally planned and projected, by forthwith commencing construction upon and prosecuting to completion, with due diligence and dispatch, the line from Spartanburg, South Carolina, to Gastonia, North Carolina, which will connect and join together the existing lines of the company.'"

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## VII.

## HISTORY OF APPLICATION BY PIEDMONT AND NORTHERN RAILWAY COMPANY FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY UNDER THE TERMS OF THE TRANSPORTATION ACT, PARAGRAPHS 19 AND 20 (TITLE 49 U. S. C. A.) AND THE RESULTING JUDICIAL PROCEEDINGS, HERETOFORE HAD, IN THE DISTRICT COURT (THREE JUDGES SITTING) UNDER THE TERMS OF THE URGENT DEFICIENCIES ACT, AND THE APPEAL TO THE UNITED STATES SUPREME COURT.

1. Pursuant to the authority and discretion conferred upon them by the stockholders' resolution of December 8, 1926, the directors never decided, determined to undertake or authorized the officers to undertake any extension or construction without having first procured from the Interstate Commerce Commission a certificate of public convenience and necessity under paragraph (18) of the act until March 10, 1930. On March 21, 1927, they authorized the officers to apply to the Commission for such certificate for the construction and operation in interstate commerce of the connecting link extension from Spartanburg to Gastonia and of a northern extension from Charlotte to Winston-Salem. This the officers did, filing the application March 26, 1927.

2. The Interstate Commerce Commission, on April 3, 1928, by its final order after full hearings denied the certificate of public convenience and necessity, 138 I. C. C. 363. It has never changed or amended that order and defendant has not to date secured such certificate for the construction or operation of either or both of its threatened extensions.

3. Thereupon defendant's officers, acting under authority of its directors, undertook to have the order of (488) the Commission denying the certificate annulled, enjoined and set aside by a direct suit in equity filed May 22, 1928, in this court, against the United States of America, under the Urgent Deficiencies Act (38 Stat. L. 218, ch. 32). Its bill was dismissed on the merits by

this court, specially constituted as a court of three judges under that act, the opinion being rendered as reported in 30 F. (2d) 421, and the final decree being entered February 1, 1929.

4. Defendant thereupon appealed to the Supreme Court of the United States and that court reversed this court for having dismissed the bill on the merits and with direction to dismiss the bill for want of jurisdiction of the court to entertain the bill, the Supreme Court's opinion being handed down on February 24, 1930, 34 L. Ed. 307.

(489) **GENERAL FINDINGS OF FACT.**

1. The court finds that the various charts and diagrams which have been introduced in evidence by the plaintiffs and defendant alike correctly portray the facts which they are intended to show. These diagrams and charts are in evidence as exhibits.

2. The foregoing findings of fact are based upon the legal and competent evidence produced upon the trial, rejecting all improper, irrelevant and incompetent parts thereof.

(490) **CONCLUSIONS OF LAW.**

The court, upon the foregoing special findings of fact, states the following as its conclusions of law:

1.

The extensions of its lines of railroad threatened by the defendant were not, and neither of them was, "undertaken", within the meaning of paragraph (18) of section 1 of the Interstate Commerce Act as amended by Transportation Act 1920, prior to the time limit fixed by that paragraph, to-wit, May 28, 1920.

2.

Defendant is not an "interurban electric railway" within the meaning of the exception contained in paragraph (22) of section 1 of the Interstate Commerce Act

as amended by Transportation Act 1920, and its threatened extensions would not be, and neither of them would be, the extension or construction of an "interurban electric railway" within the meaning of paragraph (22).

3.

Defendant is prohibited by said paragraph (18) of said section 1, from constructing either of its said threatened extensions without first having procured a certificate of public convenience and necessity from the Interstate Commerce Commission authorizing such construction.

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4.

Defendant's threatened extensions and constructions are subject to be enjoined as matter of law under the provisions of paragraph (2) of section 1 of the Interstate Commerce Act as amended by Transportation Act 1920.

5.

Unless defendant's construction of its said threatened extensions be enjoined, the intervening plaintiffs will suffer irreparable injury.

6.

The Defendant has, by corporate action and physical construction, pursuant thereto, undertaken the construction of the Spartanburg-Gastonia link only. The Defendant has not, at this time, undertaken the Charlotte-Winston-Salem extension in such a definite way as to become subject to an injunction therefrom. This Court cannot enjoin the Defendant as a corporation, or the stockholders and directors and corporate officers thereof, from thinking about, intending, or discussing the benefits of the Charlotte-Winston-Salem extension. The same reasons which justify the injunction against the construction of Spartanburg-Gastonia link, would justify, with even more compelling force, an injunction against the construction of the Charlotte-Winston-Salem Extension, when undertaken.

7.

It is to the Federal Congress that Article I, Section 8, Clause 3 of the Constitution gives the power to regulate Interstate Commerce. A Federal Court cannot take the initiative on this subject. This Court would be (492) violating the spirit of the Constitution to construe too broadly a limitation on the powers of the Interstate Commerce Commission, the creature of Congress, to which Congress saw fit to entrust such regulation. See *Transportation Co.* vs. *Parkersburg,* 107 U. S. 701, 2 S. Ct. 732, 27 L. Ed. 854.

8.

The plaintiffs in this case are entitled, as matter of law, to the injunction prayed in their respective prayers for relief.

(Signed) J. LYLES GLENN,
U. S. District Judge for Eastern and
Western Districts of South Carolina.

Rock Hill, S. C., May 23rd, 1931.

(4893) **OPINION.**

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

Interstate Commerce Commission, Southern Railway Company, Charleston & Western Carolina Railway Company, Louisville & Nashville Railroad Company, Carolina, Clinchfield & Ohio Railway, Carolina, Clinchfield & Ohio Railway of South Carolina, and Clinchfield Northern Railway Company of Kentucky, Plaintiffs,
*vs.*
Piedmont and Northern Railway Company, Defendant.

In Equity No. 253.

This Bill in equity presents in a new form a controversy which has already been before the courts. It

grows out of the proposed extension of the lines of the Piedmont & Northern Railway. It involves one major question, although the range of investigation and consequent testimony is very wide. This question may be summed up in a few words, viz., Does the Interstate Commerce Commission have jurisdiction over this particular railroad for the purpose of granting or refusing certificates of public convenience and necessity for proposed Extensions of line. The question may be stated another way with reference to the particular statute involved, viz., Does this particular railroad, Piedmont & Northern come within the special exemptions which paragraph 22 of section I, Transportation Act 1920, makes from the general powers of the Interstate Commerce Commission over abandonments and extensions of the lines of existing railroads?

(494) Paragraphs 18 to 21 of Section I, Title 49 United States Code Annotated, govern the Commission's authority and the procedure thereunder with reference to proposed constructions and proposed *abandoments.* Paragraph 22 sets out limitations on the authority of the Interstate Commerce Commission. It provides:

"The authority of the commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or to street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

As was pointed out in the opinion of the three-judge court which heard this controversy in another proceedings, the question is, whether or not this particular Piedmont & Northern Railroad comes within the second group excluded from the control and authority of the Interstate Commerce Commission. That is, does it come within the phrase "interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation?" As was pointed out in the opinion of the three-judge Court, a minor question of statutory construction is presented, which, in our opinion, may be very easily answered. This minor ques-

tion arises under the terms of paragraph 18, which provides that the certificates of public convenience, and necessity are not necessary where the particular extension was "undertaken before the dead-line of May 28, 1920.

The history of the application for a proper certificate and the action of the commission thereon, is fully set forth in the opinion of the three-judge court, which heard the former bill dealing with this controvery. While it is true that due application was made by the Piedmont &
(495) Northern Railway Company for such certificate of public convenience and necessity, this application was made with the distinct understanding that the Piedmont & Northern was not waiving its position, that it was not subject to the jurisdiction of the Interstate Commerce Commission with reference to the proposed extension. The Commission refused to grant the certificate and the matter was taken before the three-judge court as referred to above. In a very able and accurate opinion Judge Soper, sitting as a member of the court, points out the problem of statutory construction and reviews the evidence. The decision of the three-judge court was that the Commission did have jurisdiction over the Piedmont & Northern Railway Company. This decision was founded on the principle that while the Piedmont & Northern might at first view come within the terms of the exclusion paragraph, yet when all of the facts were considered in the light of the spirit of the whole Transportation Act, it was clear that Congress intended to give the Interstate Commerce Commission jurisdiction over a railroad of the nature, character and history of the Piedmont & Northern. Appeal was taken to the United States Supreme Court from the decision of the three-judge court. The United States Supreme Court, in an opinion by Mr. Justice Brandeis, decided that the three-judge court had no jurisdiction over the bill before them. This opinion is reported in Volume 280 United States Reports, at page 473. There it is pointed out that the action of the Commission in refusing to give the desired certificate was a negative order, and one which was not subject to review by the three-judge court. The closing paragraph of the opinion is:

(496) "Since plaintiffs' bill was dismissed on the merits

when it should have been dismissed for want of jurisdiction, the decree must be reversed with directions to dismiss the bill for want of jurisdiction. *Smallwood* vs. *Gallardo*, 275 U. S. 56, 62; *Shawnee Sewerage & Drainage Co.* vs. *Stearns*, 220 U. S. 462, 471; *Blacklock* vs. *Small*, 127 U. S. 96, 105. Compare *United States* vs. *Anchor Coal Co.*, 279 U. S. 812; *Onerich* vs. *Rutter*, 265 U. S. 388, 393; *Brownlow* vs. *Schwartz*, 261 U. S. 216, 218.

Reversed with direction to dismiss the bill for want of jurisdiction."

In the light of the opinion of the United States Supreme Court, the Piedmont & Northern concluded that it could ascertain its legal position with reference to paragraph 22 of Section I of the Transportation Act by actually starting construction. Accordingly, a meeting of the Board of Directors was held, and the minutes of this meeting are recorded in the following terms:

RESOLUTIONS ADOPTED AT SPECIAL MEETING OF BOARD OF DIRECTORS OF PIEDMONT AND NORTHERN RAILWAY COMPANY, HELD AT GREENVILLE, SOUTH CAROLINA, ON MARCH 10, 1930.

Mr. W. S. Lee, the President of the Company, stated that the meeting had been called for the purpose of discussing with the Directors the opinion the United States Supreme Court delivered February 24, 1930, in the case of *Piedmont & Northern Railway Company* vs. *United States, Interstate Commerce Commission, Southern Railway Company,* and others, involving the Company's right to complete its lines, and of advising with the (497) Directors about the steps to be taken in view of the decision and opinion of the court. He laid before the Board a copy of the opinion, and stated that he was advised by counsel of the company that the decision of the court does not determine the Company's right to proceed with the completion of its lines, but leaves this question for future determination in the

event the right to complete the lines should be further denied and contested. He called attention to the statement in the opinion that the right of the Company to proceed with the proposed construction is not affected or controlled by the ruling of the Interstate Commerce Commission in its report of April 3, 1928, and read to the Board the following language from the Opinion:

"Neither the assumption of jurisdiction by the Commission nor its denial of the application can operate as *res judicata* of the Railway's claim of immunity. If, as is contended, the Commission was without jurisdiction, the railway is as free to proceed with the construction as if the application had not been made and the Commission had not acted. Nothing done by the Commission can prejudice the railway's claim to immunity in any other proceeding."

The matter was thereupon thoroughly discussed in detail by all of the Directors present.

Upon motion of Capt. E. A. Smyth, duly seconded by Mr. A. F. McKissick, the following resolution was unanimously adopted:

"BE IT RESOLVED, That the completion of the lines of the company as the same were originally projected and planned to extend through the Piedmont section of North and South Carolina from Greenwood and Anderson on the South, to Durham and Winston-Salem on the North, not be abandoned, and said original plan and project is hereby reaffirmed and approved."

Upon motion of Mr. J. P. Gossett, duly seconded by Mr. J. R. Separk, the following resolution was unanimously adopted:

(498) "BE IT RESOLVED, That the officers of the company be, and they hereby are, directed and instructed to proceed toward the completion of the lines of the company as originally planned and projected, by forthwith commencing construction upon and prosecuting to completion, with due diligence and dispatch, the line from Spartanburg, South Carolina, to Gastonia, North Carolina, which will connect and join together the existing lines of the company."

I, J. C. McGOWAN, Secretary of Piedmont and Northern Railway Company, hereby certify that the foregoing is a true and correct transcript from the minutes of special meeting of Board of Directors of Piedmont and Northern Railway Company, held at Greenville, South Carolina, on March 10, 1930, and that said meeting was duly called and held in all respects in accordance with the laws of the State of South Carolina and by-laws of the Company, and that a quorum was present.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said corporation, this 11th day of March, A. D. 1930.

(Signed) J. C. McGOWAN,
Seal Secretary.

Pursuant to this resolution actual construction of the Spartanburg to Gastonia link was started, work being done at both ends. This turned the tables, and the Interstate Commerce Commission became the actor. The Commission applied to this court for leave to file its bill of equity and for a temporary restraining order restraining the Piedmont and Northern from proceeding with (499) the construction. The bill was filed and the temporary restraining order granted. Of course, the contention of the Commission is that the Piedmont and Northern is subject to its jurisdiction, and is not within the exclusion paragraph 22, Section I, 49 United States Code Annotated. The defendant has answered, taking substantially the same legal position which it took before.

In the meantime, the Southern Railway Company, Charleston & Western Carolina Railway Company, Atlantic Coast Line Railroad Company, Louisville & Nashville Railroad Company, Carolina, Clinchfield & Ohio Railway, Carolina, Clinchfield & Ohio Railway of South Carolina, and Clinchfield Northern Railway Company of Kentucky have, with leave of court, intervened as parties plaintiff. With the pleadings in this shape, the controversy has, in the opinion of this court, properly come before it as a bill of equity. It is conceded by all parties to the suit that the situation does not demand a three-judge court, and it seems that the controversy is now in the form of an "appropriate proceeding".

A hearing on the merits was had at a special term of the court in Spartanburg, South Carolina, which lasted for two weeks. At this hearing the testimony was taken which was in many respects the same testimony which had been taken before the Commission at the time of the hearing on the original application of the Piedmont and Northern for its certificate of public convenience and necessity. The testimony developed fully the history of the defendant, its nature, its construction, its method of operation and the classes of traffic handled. We have (500) endeavored to summarize the evidence in independent findings of fact which we are filing along with this opinion under the terms of Equity Rule 70 1/2. In these separate findings of fact we have classified our conclusions according to the following classifications:

1. Corporate history of the Piedmont and Northern Railway Company from early organization up to May 28, 1920, the date when paragraph 18 of Section 1 of the Transportation Act (49 U. S. C. A.) became effective.

2. The type of construction on the tracks, bridges, roadbed, and terminals of the Piedmont and Northern Railway.

3. The rolling stock and other mobile equipment used by the Piedmont and Northern Railway Company.

4. An analysis of the traffic handled and the methods of operation.

5. The probable effect of the proposed extensions from Spartanburg, S. C., to Gastonia, N. C., and from Charlotte, N. C., to Winston-Salem, N. C., and of either one of these extensions.

6. The facts as to the threatened construction.

7. The history of the application by Piedmont and Northern Railway Company for a certificate of public convenience and necessity under the terms of the Transportation Act, paragraphs 19 and 20 (Title 49 U. S. C. A.), and the resulting judicial proceedings, heretofore had, in the District Court (three-judges sitting) under

the terms of the Urgent Deficiencies Act, and the appeal to the United States Supreme Court.

With these facts all before the court we come back to the same propositions which confronted the three-judge court in passing upon this matter before. We admittedly quote from the analysis of these questions as stated by Judge Soper, with one change—the word 'petitioner' to the word 'defendant', in order to make the questions stand in their proper reference to the parties as *they are present in this suit.*

"Two substantial questions arise:

(1) Did the defendant, within the meaning of para-
(501) graph 18, undertake the proposed extension of its lines before the expiration of 90 days after February 28, 1920, when the Transportation Act went into effect?

(2) Is the defendant, within the meaning of paragraph 22, an interurban electric railway which is not operated as a part of a general steam railroad system of transportation?"

This court has carefully gone over the entire testimony and attempted to make its independent decision on these questions quite apart from any influence of the decision as rendered by the three-judge court, one for which we naturally have great respect. In such investigation we come to the conclusion that we must answer these questions in the same way that they were answered before, and we therefore come to the conclusion that the Interstate Commerce Commission does have jurisdiction over the Piedmont and Northern Railway with reference to proposed abandonments and construction.

With reference to the first question presented, viz., as to whether or not the proposed extensions had been undertaken before May 28, 1920, we agree with the statement of the evidence and the conclusions of law as stated in the opinion of the three-judge court. We point out here that the interruption in the original plans of construction as made by the Piedmont & Northern were interruptions resulting from the World War, and its

effect on business generally. More definitely the World War resulted in the government operation and control of the railroads, and the defendant here was one of the systems which the government found necessary to take over. The history of the government operation and the resulting Transportation Act of 1920 are *intersting* matters of history which it is not necessary to review in this opinion. But from whatever cause these plans were interrupted, there is no doubt that between 1912 and 1926 the defendant had not taken such definite steps (502) towards the construction of these proposed extensions as to come within what we take to be the meaning of the word 'undertaken' as used in this act. We have examined the authorities cited by Judge Soper in his opinion, and adopt them as part of this opinion. Indeed, the defendant itself seems to have agreed that this is the proper conclusion from the facts, because on appeal to the United States Supreme Court from the previous decision it appears that it practically abandoned this contention, the opinion of the court stating:

"The plaintiffs have also abandoned, in this Court, their contention that the proposed extension are part of a project undertaken prior to the effective date of paragraph 18. Their sole contention is that the court below and the Commission erred in not holding that the Railway is an interurban electric railway within the exemption of paragraph 22. The defendants renew their objections to the jurisdiction of the court."

Before leaving this phase of the case, however, we think it well to point out that the Commission has adopted a general rule of interpretation with reference to deciding whether or not an extension was "undertaken" before the date, May 28, 1920. In these decisions they have pointed out that *that* there must be something more than a mere intention to build a line in order to bring the proposed extension within the meaning of the word "undertaken". A number of these cases might be cited. The standard as set by the Commission, and adhered to with reasonable certainty, was set in its order of date May 25, 1920, three days before the ninety-day limit expired.

"The Transportation Act was approved, and said paragraph took effect, on February 28, 1920, and therefore the provisions of the paragraph apply to all extensions, constructions, acquirements and operations, and to engaging in transportation under the Act after *May 28, 1920*, and also to abandonments of all or any portion of a line of railroad, or the operation thereof, after said last mentioned date. Inquiries have been made of the Commission as to whether or not certificates of convenience and necessity are required in cases where the extension or construction has been undertaken but the (503) work has not been completed on May 28, 1920.

"The Commission holds that if the projected extension or construction is actually undertaken in good faith on or before ninety days after the approval of the Transportation Act, 1920, by a carrier subject to the Interstate Commerce Act which will operate the line, certificate will not be required of such carrier either for extension or construction or for acquirement, operation or engaging in transportation under the Act, but the undertaking must embrace not merely purpose or intent to extend or construct, but also the actual doing in good faith of acts calculated to completely effect such purpose.

"All carriers contemplating or engaged in such work should immediately notify the Commission of all the facts and circumstances connected therewith in order that the Commission may determine whether or not the work has been *actually undertaken* as contemplated by the Act and whether or not a certificate of convenience and necessity will be required.

"The Commission further holds that the mere provision in a charter or prospectus, or the making of a preliminary survey for the extension or construction of a line of railroad, does not constitute an undertaking of such extension or construction * * *."

Of course, it is clearly understood that it was not within the power of the Commission, by its administrative order, to set the standard by which a court would be governed in construing this feature of the statute. We do, however, feel that the wording of the Commission's order is a fair, reasonable and correct interpretation of the statute. We find, further, that it is one

which has been followed by several courts, and one which we feel constrained to adopt. It appears that the United States Supreme Court has never addressed itself to the precise point of construing the word 'undertake' as used in paragraph 18. So the Court has not set for us a standard as to what facts would be construed as an 'undertaking' prior to the time limit, such as to give a specific railroad the benefit of the freedom from the Commission's authority. But it has fully enun-
(504) ciated the fundamental rules for the construction of the Transportation Act, and it has elaborated the remedial purposes sought to be achieved by this legislation. It has held that the true guide to the construction of the statute is found in the consideration of such purposes. This rule will be best followed when the remedial provisions of the statute are liberally construed and the express exceptions strictly construed. It would be violative of this spirit of construction if we were to give a broad and liberal meaning to the exceptions so as to remove from the absolute prohibition of the statute a definite extension on which work was actually begun many years after the time limit, merely because it may have been planned, projected or intended prior to the time limit. Railroad undertakings are generally more ambitious in their origin than they become in completion for decades. In this very territory is a road named Charleston, Cincinnati and Chicago, with a charter setting out fully such an ambitious undertaking. A half century has elapsed and this railroad has reached neither Charleston on the one end, nor Cincinnati and Chicago on the other. Any broad and liberal interpretation of the ambitions, past intentions, purposes, plans and schemes of boards of directors of new railroads as constituting actual undertakings prior to the time limit, would nullify the very purposes sought to be accomplished by the Transportation Act. If such a rule of interpretation were to be uniformly adopted by the courts of the nation the allowed extensions would be so generally permitted on this theory that the Commission would have practically no authority over the building of new lines of railroad.

It is pointed out by the defendant that the directors and other stockholders, when they purchased stock in the
(505) Piedmont and Northern, did so with the idea that

the present extensions under discussion would be built. It is suggested, therefore, that the restriction of the Piedmont and Northern to its existing lines is in impairment of contract. We agree that the Transportation Act may work a hardship on these particular stockholders, and perhaps as great a hardship in the case of the Piedmont and Northern as of any other carrier, but such hardship does not mean that contracts have been impaired so as to render the statute unconstitutional. (See *L. & N.* vs. *Motley,* 219 U. S. 466.) There the Supreme Court held that the contract which Motley had entered into with the L. & N. was entered into with the railroad with full knowledge that railroads were, under the Federal Constitution, subject to regulation by Congress, and that the contract, though valid and enforcible when made, could be, and was, rendered invalid by the subsequent regulatory act of Congress. In the same way, contracts which were entered into with the Piedmont and Northern by subscriptions to the syndicate agreement or purchases of shares of stock which may have been made in reliance upon the intention to build a more extensive line of railroad were entered into with full knowledge that this interstate carrier could be regulated by the Federal Congress. Not only was the Piedmont and Northern subject to be *be* regulated by Congress, but during the war period it was actually taken over and operated by the government as a means of expediting the transportation necessary for war purposes. The Transportation Act, with the large powers which it gave to the Commission, was the death knell to *may* pet schemes, plans and ambitions of railroad promoters, and this court, in construing the Act, cannot deviate from a (506) plain rule of construction because of the hardship resulting to one individual corporation. The Transportation Act fell, as the axe of the guillotine, suddenly and effectively upon many of the railroad systems of this country.

Again, in considering the history of the Piedmont and Northern, we cannot overlook the fact that it was tied up, so far as its successful construction and operation were concerned, with the personality of Mr. James B. Duke. Mr. Duke was the man who, in the last analysis, was making the railroad possible, and without his assent and aid no construction would have been under-

taken. In the specific findings of fact in this case, we have pointed out that while some of the directors were at all times anxious to extend the lines of the Piedmont and Northern, they had great difficulty in getting Mr. Duke to authorize such extension. The testimony and the written exhibits, in our opinion, fully justify the conclusion that from 1914 until 1920, Mr. Duke never had any well formed intention of beginning actual construction on either the Spartanburg-Gastonia link or the Charlotte-Winston-Salem extension. Mr. Duke died in 1925, and the fact that no actual construction was entered upon until after his death corroborates the view that his dominating influence was never exerted in behalf of definite extension before the year 1920.

A very resourceful argument is made by the defendant, which may be briefly stated in this language, viz., that the Piedmont and Northern was an essential part of the Duke enterprises in Piedmont Carolinas; that from 1910 until 1920 active construction of some part of the Duke enterprises was constantly going on. From this (507) we are asked to conclude and hold as a matter of law that the construction of the railroad was, therefore, never at any time abandoned; that as the construction of the whole scheme was constantly under way, we cannot say that the construction of any integral part was ever abandoned. It is true that during the years from 1914 to 1920, the Duke Power Company and affiliated interests were building hydroelectric plants, power lines, cotton mills, and were expending million of dollars in educational and charitable institutions. It is true that the Piedmont and Northern is owned by the same interests, and that it serves territory in which the Duke interests are located. But the fact remains that Mr. Duke, during these years, never took any very definite steps towards extending the lines of the Piedmont and Northern Railway.

We now come to the consideration of the major question involved in this case as it has been stated above. We come to the conclusion that the defendant is such a railroad as to fall without the meaning of the exception of paragraph 22, Section 1 of the Transportation Act. The whole problem may be summed up in a few words. Manifestly, if we construe the terms of paragraph 22 in a literal, dictionary and etymological sense of the words

used, the Piedmont and Northern would fall within such a meaning of the words as used. The statute says that the requirements of paragraphs 18 to 21 shall not apply to "interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation." The Piedmont and Northern is certainly an interurban railway in the sense that it runs between cities. It is certainly an electric railway, in that its equipment and trains are motivated by electric (508) power. We finally conclude that while it is closely tied up by existing traffic agreements, some of them highly preferential, yet its independence of control and operation is such as to keep us from saying that it is operated as a part of any general steam railroad system of transportation. But if we allow such a literal construction to control us, we cannot help but feel that we would be flying directly in the face of the remedial purpose of the entire Transportation Act. We feel, further, that to do so would be to disregard the rule of construction of this particular statute which has been laid down for us by the United States Supreme Court. Further than that, the help which we have been able to get from the reports of committees and debates in Congress when the Transportation Act was being considered, clearly indicates that Congress never intended to deprive the Commission of jurisdiction over extensions by a major interstate carrier of such importance as the Piedmont and Northern is shown to be.

We will present first our views as to the construction of the Transportation Act by the United States Supreme Court. Manifestly, we cannot go into all of the many cases in which this important legislation has been construed by that high court, but in each instance, when the statute has been before the court for construction, the court has construed the statute in the light of the remedial purposes of this legislation.

The first case involved the power of the Interstate Commerce Commission to remove discrimination against persons and localities. There suit was brought to enjoin state regulatory officers from interfering with the rates which were fixed by the Federal Interstate Commerce (509) Commission. The Supreme Court sustained the injunction, and in the course of the opinion rendered by the late Chief Justice Taft, the general purposes of the Act were outlined:

"From January 1, 1918, until March 1, 1920, when the Transportation Act went into effect, the common carriers by steam railroad of the country were operated by the Federal government. Due to the rapid rise in the prices of material and labor in 1918 and 1919, the expense of their operation had enormously increased by the time it was proposed to return the railroads to their owners. The owners insisted that their properties could not be turned back to them by the government for useful operation without provision to aid them to meet a situation in which they were likely to face demoralizing lack of credit and income. Congress acquiesced in this view. The Transportation Act of 1920 was the result. It was adopted after elaborate investigations by the Interstate Commerce Committees of the two Houses.

"It is manifest from this very condensed recital that the act made a new departure. Theretofore, the control which Congress, through the Interstate Commerce Commission, exercised, was primarily for the purpose of preventing injustice by unreasonable or discriminatory rates against persons and localities, and the only provisions of the law that inured to the benefit of the carriers were the requirements that the rates should be reasonable in the sense of furnishing an adequate compensation for the particular service rendered, and the abolition of rebates. The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States. This is expressly declared in Sec. 15a to be one of the purposes of the bill."

Another clear statement of the fundamental purposes of is found in the opinion of Mr. Justice Brandeis, in the *New England Divisions case*, 261 U. S. 184. There an express provision of the statute dealing with the division of rates was construed in the light of the remedial purposes of the whole legislation. Mr. Justice Brandeis said:

"Transportation Act 1920 introduced into the Federal legislation a new railroad policy. *Railroad Commission* vs. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, 585, 66 L. Ed. 371, 382, 22 A. L. R. 086, 42 Sup. Ct. Rep. 232. Theretofore, the effort of Congress had been directed mainly to the prevention of abuses; particularly those

(510) arising from excessive or discriminatory rates. The 1920 Act sought to insure, also adequate transportation service. That such was its purpose, Congress did not leave to inference. The new purpose was expressed in unequivocal language. And to attain it new rights, new obligations, new machinery, were created. The new provisions took in a wide range. Prominent among them are those specially designed to secure a fair return on capital devoted to the transportation service. Upon the Commission new powers were conferred and new duties were imposed.

"The credit of the carriers, as a whole, had been seriously impaired. To preserve for the nation substantially the whole transportation system was deemed important."

Similar quotations might be made from many other cases, particularly *Dayton-Goose Creek Railway* vs. *United States*, 263 U. S. 456. But all of these cases are referred to and discussed in the previous opinion by the three-judge court, which is reported in 30 F. (2nd), at page 429, 430 and 431. This opinion, going over the same ground, and deciding the same question in the same way, admittedly tracks the former decision of the three judges, both in view of the law and in statement of the evidence. We respectfully submit, however, that the question as we see it, is not reducible to the single inquiry as to whether or not the Piedmont and Northern is an "interurban railway". We think a more accurate statement of the question is whether the Piedmont and Northern, although literally an interurban electric railway, not operated as part of a general steam railroad system, possesses so many of the characteristics and functions of a great interstate carrier as to negative any conclusion that Congress ever intended to exempt a railroad of its type and magnitude from regulation by the Interstate Commerce Commission with respect to control over abandonments and extensions. However, we reason about the words 'interurban' and 'electric', the Piedmont and Northern comes within the *prima facie* meaning of each of these words. It has been so denominated both as a matter of common designation by the public and of classification in railroad circles. It was and has been referred to as "interurban" by Court and Commission (511) State and Federal. Even the Interstate Commerce Commission, itself, has for many purposes classi-

fied it as an interurban railway, and on the trial of this case documents were introduced wherein the Commission had, in referring to the Piedmont and Northern, referred to it as an interurban railway. It is not, as we see it, a contest to be waged over the word 'interurban' and its meaning, but it is a decision of the question of whether or not paragraph 22, when construed in the light of the whole Transportation Act, can be said to include within its terms, the Piedmont and Northern Railroad, when due regard is given to its history, its physical characterictics, its methods of operation, the character of traffic handled, and its importance as an interstate carrier viewed from a national standpoint.

We feel that the case which gives us the most help, and the one which really has caused this court to come to the conclusion announced, is a case which construes the other clause in the particular amendment which we are here called upon to construe. The entire paragraph 22 reads as follows:

"The authority of the commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

The Supreme Court has had occasion to construe the meaning of "spur, industrial, team, switching, or side tracks, located or to be located wholly within one State". We, therefore, submit that the best authority for the construction of the remaining words of this paragraph is the construction which the United States Supreme Court has placed upon the phrase just quoted. We refer to the case of *Texas and Pacific Railway Company* vs. *Gulf*, (512) *Colorado & and Santa Fe.* The Court in that case laid down the true guide for the construction of paragraph (22). It held that the guide was to be found in the context in which the language was used, and in the relation of the specific provisions to the railroad policy and legislative purpose introduced by the Transportation Act. If the Court in that case had 'stuck in the bark' of the particular word used, had given to that word in this exclusion provision a purely literal mean-

ing, the track sought to be built by the Gulf, Colorado & Santa Fe would have been an 'industrial track' just as much as the defendant in this case would be an 'interurban electric railway' within a strictly literal interpretation of that expression.

The Supreme Court, in the Texas & Pacific case, did not allow their interpretation of the meaning of 'industrial track' to be controlled by arguments based on the rulings of the Commission as to what were industrial tracks, or by the sense in which railroad companies had loosely employed this expression. If they had been guided by such considerations, they would assuredly have held that the proposed track of only seven and one-half miles was an industrial track. But the Supreme Court expressly repudiated these considerations, and took as its guide the real purpose which the extension would serve. They held that it was not an industrial tracks, but a real extension for which a certificate had first to be procured from the Interstate Commerce Commission before construction would be allowed, because of the effect which this extension would have on the rival railroad companies. We quote fully from this case:

(513) "A truer guide to the meaning of the terms extension and industrial track as used in Paragraphs 18 to 22, is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by Transportation Act, 1920. By that measure, Congress undertook to develop and maintain, for the people of the United States, in adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss. See *R. R. Com.* vs. *C., B. & Q. R. R. Co.*, 257 U. S. 563 (42 S. Ct. 232, 66 L. Ed. 371, 22 A. L. R. 1086); *The New England Divisions Case*, 261 U. S. 184 (43 S. Ct. 270, 67 L. Ed. 605); *The Chicago Junction Case*, 264 U. S. 258 (44 S. Ct. 317; 68 L. Ed. 667); *R. R. Com.* vs. *Southern Pacific Co.*, 264 U. S. 331 (54 S. Ct. 376, 68 L.

Ed. 713). The act sought, among other things to avert such losses.

"When the clauses in Paragraphs 18 to 22 are read in the light of this congressional policy, the meaning and scope of the terms extension and industrial track become clear. The carrier was authorized by Congress to construct, without authority from the Commission, 'spur, industrial, team, switching or side tracks * * * to be located wholly within one State'. Tracks of that character are commonly constructed either to improve the facilities required by shippers already served by the carrier or to supply the facilities to others, who being within the same territory and similarly situated are entitled to like service from the carrier. The question whether the construction should be allowed or compelled depends largely upon local conditions which the state regulating body is peculiarly fitted to appreciate. Moreover, the expenditure involved is ordinarily small. But where the proposed trackage extends into territory not heretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern. For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest. If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of Paragraph 18, although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks. Being an extension, it cannot be built unless the federal commission issues its certificate that public necessity and convenience require its construction The Hale-Cement Line is clearly an extension within this rule."

(514) Such is the construction placed upon one-half of paragraph 22. It is only logical to apply the same construction to the remaining portions of the same paragraph, *noscitur a sociis*. Congress bracketed these phrases together and it would be highly illogical to apply one rule of construction to one phrase and a different rule to the other.

Now, when we study the legislative history of paragraph 22, the close connection between the two groups referred to in this paragraph of exclusion becomes even more apparent. Indeed, as the Transportation Act was first written, the phrase 'wholly within one State' modified all of the other phrases in the paragraph. The 'wholly within one State' was a limitation on the phrase, 'street, suburban or interurban railways which are not operated as a part or parts of a general steam railroad system of transportation', as well as upon the phrase, 'spur, industrial, team, switching, or side tracks'. In other words, to make a long story short, the original purpose of paragraph 22 was to reserve to the state some rights to regulate transportation within its own borders. The state regulatory bodies organized themselves into a national organization. They sent representatives to Washington to appear before the committees drafting the Transportation Act. Their whole purpose was, of course, to retain some authority for themselves. Likewise, the strong advocates of States' Rights were insistent that some control of commerce, at least intrastate, be left with the state governments. Through all of these proceedings the question of location within one state was the dominating consideration, it being conceded that where a carrier was one of national importance and scope, it was subject to regulation by Congress only, and therefore would properly fall, for all purposes, under the jurisdiction of the Interstate Commerce Commission. After (515) studying this record, and in the greatest detail, we come to the conclusion that the reason for the transposition of the phrase 'wholly within one state' from the end of paragraph 22 to the middle thereof, is easily explained. This transposition was supported it is seen, by the gentlemen representing certain states. A study of these states shows that in each case they were states where some of their territory was closely adjacent to a large city located within the borders of another state. Indiana's location with reference to Chicago is a typical illustration. When this amendment is seen in the light of this history it is clear that the purpose of the amendment was to deal with local situations, and it in no way evidences a serious intention of depriving the Interstate Commerce Commission of jurisdiction and its control for abandonment and construction purposes over any important interstate carrier whose general transportation of in-

terstate freight was so large as to make it a carrier of national importance. In a note filed along with this opinion, we make definite reference to the proceedings referred to in this part of our opinion. See attached note under separate cover.

The Interstate Commerce Commission and the intervening railroads have in their arguments and presentation of the testimony magnified the connection of the Piedmont and Northern with certain other railways. They have furthermore magnified the intimacy between the Piedmont and Northern and the other Duke interest in Piedmont Carolinas. They point out in general and specific terms the extent to which traffic is controlled by an existing agreement between the Piedmont and Northern and the Seaboard Air Line Railway. This agreement governs the interchange of freight at Greenwood, South Carolina. The results of this agreement (516) are no doubt felt very seriously by the Southern, the Coast Line and its affiliated lines, and even by the L. & N. We have allowed the evidence along this line to be introduced and consider it important, in that it shows the nature of traffic handled by the Piedmont and Northern Railroad Company, and therefore goes to show its importance as an interstate carrier. The question of the extent of such injury suffered from this agreement is primarily one for the Commission to have in mind when it passes upon the wisdom of granting or denying its certificate, but we think that it is proper evidence before this court to aid it in the solution of the question as to whether or not Congress intended to exempt a railroad of the nature and of the importance of the Piedmont and Northern Railroad Company from the requirements of Sections 18 to 21, of the Transportation Act.

The convincing evidence also shows the amount of freight which the extension from Charlotte to Winston-Salem would take away from the present railroads serving that territory. This, too, is a consideration primarily for the Interstate Commerce Commission, but the fact that such an extension would control the handling of millions and millions of dollars of revenue does show that the Piedmont and Northern as it now exists is a railroad of such importance from a national standpoint as to negative any idea that its proposed extensions are matters of purely local interest. As an example of the figures involved, it is pointed out that the Southern

now derives $750,000 a year in revenue from coal hauled to one of the Duke steam plants near Salisbury, North Carolina. Of course, if the Winston-Salem extension is built *parallelling*, as it will, the Southern, this freight will be handled by the Duke-owned railway, and the Southern will lose this enormous revenue. We might cite (517) many such illustrations of the direct effect of the affiliation of the Piedmont and Northern Railway with other Duke interests.

The intervening plaintiffs also stress the intimacy between the Piedmont and Northern and the Durham and Southern. It is pointed out that although there is no physical connection between these two railroads, and although the Durham and Southern was in very bad condition until it came under the control and supervision of the corporate officers of the Piedmont and Northern, that so great had been the benefit derived from affiliation with the Piedmont and Northern that now the Durham and Southern is actually in the recapture class. We think that the intervening plaintiffs have magnified this connection to the point of making a mountain out of a mole hill, but at the same time it is just another illustration of the fact that the Piedmont and Northern is now an important factor in through freight transportation, and that with the proposed extensions it would become such an important line of railway as to injure seriously the three great trunk lines now serving the Atlantic Seaboard in the handling of North and South traffic. A study of the maps will readily show that the tie-up from Winston-Salem to Charlotte, to Gastonia to Spartanburg, Greenville and Greenwood, thence via the Georgia and Florida, or by the Seaboard, would create another through line for north and south traffics. Of course, this new, through line is the real reason for the strenuous objection raised by the intervening carriers.

Finally, this court points out that it has carefully avoided the injection into this opinion, as well as into (518) its deliberations over this case, of the economic considerations. We are not ignorant of the benefits which the Duke interests have conferred upon this section of the Nation. From an industrial standpoint they have literally made the Piedmont Carolinas to blossom as a rose. Through the vision and philanthropy of Mr. James B. Duke, carried on after his death by the terms of the Duke Endowment, hospitals, universities, schools and

orphanages are benefitting this section beyond the dream of man, beyond anything that has ever been seen in this country before. Humanitarianism and business efficiency are joined in the development of the resources of this section, enlargement of educational and business opportunity, and in the alleviation of human suffering.

But all of these considerations have no place when we are faced with the direct problem of statutory construction, and when this problem of statutory construction arises out of a statute regulating interstate commerce, one of the fields specifically allotted to the Federal Congress by the Constitution of the United States, we must be controlled by the spirit of the Constitution, and by the spirit of the particular piece of legislation before us.

Likewise, we have divested our minds of any considerations of political philosophy. The wisdom of the Transportation Act is not for us at this time. Our problem is the construction of it, and we feel that we have followed the guide as laid down for us by the United States Supreme Court in the case of *Texas and Pacific Railway Company* vs. *Gulf, Colorado & Santa Fe Railway Company,* 270 U. S. 266.

For these reasons, which are based upon the findings of fact separately filed under the requirements of Rule 70 1/2, It is the opinion of this court that the In-
(519) terstate Commerce Commission does have jurisdiction over the Piedmont and Northern Railway Company for the purposes set out in paragraphs 18 to 21 inclusive of Section 1 of the Transportation Act, 1920, and that therefore this court must grant its injunction against the further prosecution of any construction on the extensions from Spartanburg, S. C. to Gastonia, North Carolina, or from Charlotte, North Carolina, to Winston-Salem, North Carolina.

Let an appropriate order be submitted for signature.

(Signed) J. LYLES GLENN,
United States District Judge for Eastern
& Western District of South Carolina.

Rock Hill, S. C.,
May 23rd, 1931.

(520) **NOTE FILED WITH OPINION AND REFERRED TO THEREIN.**

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA, GREENVILLE DIVISION.

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In Equity No. 253.

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Interstate Commerce Commission, et al.,

*vs.*

Piedmont & Northern Railway Company.

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This note was furnished to the Court by Messrs. Haynesworth and Haynesworth of counsel for Defendant. It is in absolute accord with the record as this Court has found it to exist. It also is in accord with records furnished and cited by Plaintiff, Interstate Commerce Commission. It is adopted by this Court as a note explaining the legislative history of the pertinent sections of the statute involved.

This note is referred to on page 23 of the opinion herewith filed and deals with the hearings before committees, Reports of committees and comments in the Senate and House. Pages 28, 29 and 30 show how phrase "Located or to be located wholly within one State" was transposed from end of paragraph 22 (Section 1, Transportation Act, 1920, 49 U. S. C. A.), to middle of the same paragraph.

(Signed) J. LYLES GLENN,
United States District Judge for Eastern and Western District of South Carolina.

(521)

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(522)

## I—INTRODUCTION.

The Army Appropriation Act, approved August 29, 1916, (39 St. L. 645) contained a provision, known as the Federal Possession and Control Act, reading as follows:

"* * * The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable * * * ."

An Act (Federal Control Act) to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes was approved March 21, 1918 (40 St. L. 451) and Section 14 thereof provided in part as follows:

"That the Federal control of railroads and transportation systems, herein and heretofore provided for shall continue for and during the period of the war and for a reasonable time thereafter, which shall not exceed one year and nine months next following the date of the proclamation by the President of the exchange of ratifications of the treaty of peace * * * . The President may relinquish all railroads and systems of transportation under Federal control at any time he shall deem such action needful or desirable * * * ."

In a message addressed to Congress on May 20, 1919, the President of the United States said:

"The railroads will be handed over to their (end of page 1) owners at the end of the calendar year * * * ."

and on December 24, 1919, issued a proclamation reading in part as follows:

"* * * Whereas I now deem it needful and desirable that all control be relinquished therefrom; * * *

"Now, therefore, under authority of section 14 of the Federal Control Act approved March 21, 1918, and of all other powers and provisions of law thereto me enabling, I, Woodrow Wilson, President of the United States, do hereby relinquish from Federal Control, effective the 1st day of March, 1920, at 12:01 o'clock, a. m., all railroads, systems of transportation and property * * * and restore the same to the possession and control of their respective owners * * * ."

The purpose of the Transportation Act, 1920, approved February 28, 1920, (41 St. L. 456) was to meet the requirements of existing law as proclaimed by the President, by providing for the termination of Federal Control of railroads and systems of transportation. In (523) addition the Act provided for the settlement of disputes between carriers and their employees, and further amended an Act entitled "An Act to regulate commerce", approved February 4, 1887.

(End page 2.)

II—HISTORY OF THE TRANSPORTATION ACT OF 1920.

On June 2, 1919, Mr. Esch of Wisconsin, introduced in the House of Representatives H. R. 4378 (66th Congress).

On the same date, Senator Pomerene of Ohio, introduced in the Senate S. 1256 (66th Congress). This bill was identical with H. R. 4378. The primary purpose of these two bills was to amend the Commerce Act of 1887.

H. R. 4378 was referred to the House Committee on Interstate and Foreign Commerce and constituted the basis for hearings conducted over a period extending from July 5 to September 27, 1919, inclusive, which related to the return of the railroads to private ownership, and necessary amendments to the Commerce Act of 1887.

In the meantime a subcommittee of the Senate Committee on Interstate Commerce had been considering hearings already held in connection with continued Federal control, and through Senator Cummins of Iowa, introduced in the Senate S. 2906 (66th Congress). This

was on September 2, 1919. The bill was referred back to the Senate Committee on Interstate Commerce which had it under continuous consideration until October 22, 1919, when by direction of the Committee, Senator Cummins introduced S. 3288 (66th Congress). On the same date, without amendment, S. 3288 was reported by the Committee to the Senate.

(End page 3)

During this time and after the House Committee on Interstate and Foreign Commerce had commenced its hearings, various other bills had been introduced relating to the railroad problem. Among these was H. R. 8157 (66th Congress) introduced in the House by Mr. Sims of Tennessee, embodying the so-called "Plumb Plan". All bills relating to the railroad subject, including bills in- (524) troduced in the Senate, were considered by the House Committee.

At the conclusion of the hearings before the Committee on Interstate and Foreign Commerce of the House, a subcommittee was organized to draft a bill providing for the termination of Federal control and other purposes. The results of the labor of this subcommittee were embodied in H. R. 10453 (66th Congress) introduced in the House by Mr. Esch on November 8, 1919. The bill was referred to the whole committee, and reported back to the House on November 10, 1919, with the recommendation that it do pass.

Some of the proposals offered were not printed in bill form, but all suggestions received careful consideration by the committees of the two Houses. Briefly the Transportation Act, 1920, came into being as follows:

H. R. 4378 (Esch) constituted basis for hearings and drafting of H. R. 10453, which was considered and passed by the House of Representatives.

S. 2906 (Cummins) constituted basis for drafting of S. 3288, which was considered and passed by the Senate. In (End page 4) the Senate, the provisions of this bill, (S. 3288), were substituted for the provisions of the bill passed by the House; and

The Transportation Act, 1920, was written by the Committee of Conference, appointed by the two Houses.

(End page 5)

(525) III—THE FOUR MAJOR BILLS CONSTITUTING THE BASIS OF THE TRANSPORTATION ACT.

For the purpose of affording a brief and ready reference of the subject matter of each section of the four major bills introduced relating to the railroad problem as it existed in 1919 and 1920, the following resume of each has been prepared. Only the subject matter of the sections of each bill is given.

(End of Page 6.)

(526)

H. R. 4378
(66th Congress)

| Section of Bill | Proposing amendments to various sections of the Commerce Act of 1887, as follows: |
|---|---|
| 1 | Sec. 1, defining "common carriers" engaged in "interstate commerce." |
| 2 | Sec. 1, relating to "car service" and the "extension, construction, or abandonment of new lines of railroad. |
| 3 | Sec. 2, relating to "unjust discrimination." |
| 4 | Sec. 3, relating to "interchange of traffic" and "common use of terminals." |
| 5 | Sec. 5, relating to "pooling of freight" and "consolidation of properties." |
| 6 | Sec. 5, relating to "waterline operation by railroads." |
| 7 | Sec. 6, relating to "printing and filing of schedules." |
| 8 | Sec. 6, "prohibiting a carrier from engaging in transportation unless schedules are filed and published." |
| 9 | Sec. 6, relating to "physical connection between rail lines and dock." |
| 10 | Sec. 6, relating to definition of "joint rates" and "proportional rates." |
| 11 | Sec. 7, relating to "freight carriage being treated as continuous unless stopped in good faith." |
| 12 | Sec. 10, relating to "penalties for violations of Act by carriers, corporate officers, agents, or employees." |

13 Sec. 13, by adding two new paragraphs relating to "cooperation with State authorities and correction of discrimination against interstate commerce."

14 Sec. 15, relating to "determination of rates, classifications, etc., by commission" and "establishment of through routes, joint classifications, etc."

15 Sec. 16, prescribing "penalty for refusal to obey orders made under sections 3, 13 or 15."

16 Sec. 20, relating to authority of "commission to prescribe forms of accounts, records, etc."

17 Creation of a new section (20a) relating to the issuance of "securities."

(End of Page -7-)

(527) SENATE 2906
(66th Congress)

| Section of Bill | Proposing the following: |
|---|---|
| 1 | Termination of Federal control. |
| 2 | Settlement of indebtedness of carriers. |
| 3 | Definitions. |
| 4 | Establishment of rate districts and rate groups. |
| 5 | Establishing guaranty of income. |
| 6 | Creation of "recapture" principle. |
| 7 | Creation of Railway Transportation Board. |
| 8 | Powers of Railway Transportation Board. |
| 9 | Declaration of policy creating a limited number of systems. |
| 10 | Transportation Board to adopt plan for consolidation, and further defining duties of Board. |
| 11 | Additional powers of Railway Transportation Board. |
| 12 | Permissive consolidations under plan adopted. |
| 13 | Enforced consolidations after seven years. |
| 14 | Authority for reincorporation under United States Laws. |

15
16
17 Methods of reincorporation;
18 Transfer of powers, duties, etc.
19
20

21
22 Incorporation for conducting railway operations
23 under plan of enforced consolidations.

24 Relating to issuance of "securities."
(End of Page -8-)

25 Distribution of excess earnings.

26
27 Creation of Committee on Wages and Working
28 Conditions; Powers, duties, penalties, etc.
29

30 Dissolution of corporations.

31 Increasing compensation of members of the Interstate Commerce Commission.

(528)

32 Amendment to Sec. 1 of the Commerce Act, relating to "car service" and "extension, construction and abandonment of lines of railroad."

33 Amendment to Sec. 2, relating to "unjust discriminations."

34 Amendment to Sec. 2, relating to "interchange of traffic."

35 Amendment to Sec. 4, relating to "long and short haul" and "elimination of water competition."

36 Amendment to Sec. 5, relating to "pooling of freight" and "division of traffic."

37 Amendment of Sec. 6, relating to "printing and filing of schedules."

38 Amendment to Sec. 6, relating to "carrier engaging in transportation unless schedules are filed."

39 Amendment to Sec. 6, relating to "physical connection between rail lines and docks."

40 Sec. 6, definition of "joint" and "proportional" rates.

41 Sec. 7, relating to "continuous freight carriage."

42 Sec. 10, relating to penalties for violation of the Act.
43 Sec. 13, relating to cooperation with State authorities.
44 Sec. 15, relating to "determination of rates," and "establishment of through routes," etc.
45 Sec. 16, prescribing "penalty for refusal to obey orders made under sections 3, 13 or 15."
46 Sec. 20, relating to authority of "commission to prescribe forms of accounts, records, etc."

(End of Page -9-)

(529) SENATE 3288
(66th Congress)

Section of Bill — Proposing the following:

1 Termination of Federal control.
2 Settlement of indebtedness of carriers.
3 Definitions.
4 Establishment of rate districts and rate groups.
5 Establishing guaranty of income.
6 Creation of "recapture" principle; and distribution of excess earning.
7 Creation of "Transportation Board."
8 Powers of Transportation Board.
9 Declaration of policy creating a limited number of systems.
10 Transportation Board to adopt plan for consolidations into a limited number of systems. Also defining duties of Board.
11 Additional powers of Transportation Board.
12 Permissive consolidations under plan adopted.
13 Enforced consolidations after seven years.
14 Authority for reincorporation under U. S. laws.
15–20 Method of reincorporation, transfer of powers, duties, etc.

12, 22, 23 Incorporation for conducting railway operations under plan of enforced consolidations.

24 Relating to the issuance of "securities."

25, 26, 27, 28, 29, 30, 31 Creation of Committee of Wages and Working Conditions; Powers, duties, penalties, etc. Also creation of Regional Boards of Adjustment, etc.

(End of Page -10-)

32 Dissolution of corporations.

33 Increasing compensation of members of Interstate Commerce Commission.

34 Amendment to Sec. 1 of the Commerce Act, relating to "car service" and "extension, construction and abandonment of lines of railroad."

(530)

35 Amendment to Sec. 2, relating to "unjust discrimination."

36 Amendment to Sec. 2, relating to "interchange of traffic."

37 Amendment to Sec. 4, relating to "long and short haul" and "elimination of water competition."

38 Amendment to Sec. 5, relating to "pooling of freight" and "division of traffic."

39 Sec. 6, relating to "printing and filing of schedules."

40 Sec. 6, relating to "physical connection between rail lines and docks."

41 Sec. 6, definition of "joint" and "proportional rates."

42 Sec. 7, relating to "continuous freight carriage."

43 Sec. 13, relating to cooperation with State authorities.

44 Sec. 15, relating to "determination of rates," and "establishment of through routes, etc."

45 Relating to schedule of rates by water carriers.

46 Sec. 16, penalties for refusal to obey orders under 3, 13, 15.

47 Sec. 20, relating to accounts of carriers.

48 "That sections 20, 24, 25, 26, 27 and 28 shall not apply to street, suburban or interurban electric railways operated chiefly for the transportation of passengers and not a part or parts of a general system of transportation conducted and operated in the ordinary way."

(End of Page -11-)

(531) H. R. 10453
(66th Congress)

Title and Section of Bill — Proposing the following:

| | |
|---|---|
| Title I | Definitions |
| 1, 2 | Definitions |
| Title II | Termination of Federal control. |
| 200 | Termination of Federal control. |
| 201 | Government-owned boats on inland waterways. |
| 202 | Settlement of matters arising out of Federal control. |
| 203 | Inspection of carriers' records. |
| 204 | Causes of action arising out of Federal control. |
| 205 | Refunding of carriers' indebtedness to United States. |
| 206 | Existing rates to continue in effect. |
| 207 | Guaranty to railroads after termination of control. |
| 208, 209 | New loans to railroads. |
| 210 | Execution of powers of President. |
| 211 | Investigation of needs of water transportation. |
| Title III | Disputes between carriers and their employees. |
| 300 | Definitions. |
| 301 | Creation of "Railway Labor Adjustment Board." |
| 302, 303, 304, 305, 306, 307 | Methods of appointments, powers and duties of Board, etc. |

308 Creation of "Railway Labor Board of Appeals."

309
310
311
312
313
314
315
316 Eligibility of members, powers and duties, etc.

(End of Page -12-)

317 Compensation of members of Boards.
318 Appropriation for expenses.

(532)
319 Repeal of Act of "Mediation and conciliation."
Title IV Amendments to the Commerce Act of 1887.
400 Sec. 1, defining "common carriers" and duties of, with respect to "just and reasonable charges and service" and "issuance of free passes."
401
402 Inserts paragraph numbers; and amendment to Sec. 1, relating to "car service" and "extension, construction and abandonment of lines of railroad."
403
404 Inserts paragraph numbers; and amendment to Sec. 2, relating to "unjust discrimination."
405 Amendment to Sec. 3, relating to "interchange of freight" and "common use of terminals."
406
407 Inserts paragraph numbers; and amendment to Sec. 5, relating to "pooling of freight" and "consolidation of properties."
408 Amendment to Sec. 5, relating to "water line operation by railroads."
409
410
411 Inserts paragraph numbers; and amendment to Sec. 6, relating to "physical connection between rail lines and docks."
412 Amendment to Sec. 6, establishing "joint" and "proportional rates."
413
414
415 Inserts paragraph numbers; and amendment to Sec. 13, relating to "cooperation with States in rate proceddings."

416 } Inserts paragraph numbers; and amendment to
417 } Sec. 15, relating to "joint rates, fares and charges."

418 } Inserts paragraph numbers; and amendments to
419 } Sec. 15, relating to "diversion of traffic."

420 }
421 } Inserts paragraph numbers; and amendment to Sec. 16, relating to "time limitation upon actions
422 } for damages."

(End of Page -13-)

423 }
424 } Inserts paragraph numbers; and amendment to Sec. 16, relating to "penalties for neglect to obey orders under sections 3, 13 and 15."

427 }
428 } Inserts paragraph numbers; and amendment to Sec. 17, relating to "membership of divisions" of
429 } the Commission.

430 }
431 } Inserts paragraph numbers and paragraph letters.
432 }

(533)

433 Amendment to Sec. 20, relating to "accounts of carriers."

434 } Inserts paragraph numbers; and amendment to
435 } Sec. 20, relating to "damages by water carrier."

436 Amendment to Sec. 20, relating to "time limitation for filing of claims," etc.

437 Amendment creating a new section (20a) relating to the issuance of "securities."

438 Amendment creating Sec. 25, relating to "train-control devices."

(End of Page -14-)

(534) IV—EXEMPTION OF ELECTRIC RAILWAYS FROM THE PROVISIONS OF VARIOUS SECTIONS OF THE COMMERCE ACT OF 1887, AS AMENDED, BY THE TRANSPORTATION ACT, 1920.

Title IV of the Transportation Act of 1920, as finally enacted contained many amendments to the Commerce Act of 1887, as amended. Not a few of these new amendments related directly to the welfare of the electric railway industry, and a chronological history of each is attempted herewith.

(End. page 15.)

*Extension, Construction, and Abandonment of Lines of Railroad.*

Interstate Commerce Act
Section 1—Paragraph 22

Paragraph 22 of Section 1 of the Interstate Commerce Act, as amended, contains the following language:

"The authority of the Commission conferred by paragraphs (18) to (21) both inclusive, shall not extend to the construction or abandonment of * * * street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

Section 2 of H. R. 5378 (Esch) relating to this subject did not exclude electric railways from its provisions.

On August 28, 1919, at a hearing before the House Committee, Mr. Charles E. Elmquist, General Solicitor and President of the National Association of Railroad and Utilities Commissioners, offered an amendment to Sec. 2 of H. R. 4378, reading as follows:

"Provided, That the authority of the Commission conferred by this section shall not extend to the construction of sidetracks, spur, industry, team or switching tracks, street car and electric interurban lines, or to extensions of lines of steam railroads or to the construction of new lines to be located wholly within one State." (H. Hrgs. Vol. II, page 1611.)

(End page 16)

(535) In support of this amendment, Mr. Elmquist made the following statement:

"As we read the language of this bill (H. R. 4378), it would give to the Interstate Commerce Commission the right, perhaps, to issue a certificate of convenience and necessity for the construction of spurs, sidetracks and industry tracks, and extension of main lines or

branch lines. It is the judgment of the (State) commissioners that the Interstate Commerce Commission should not be given the power to control the building of spur and industry tracks and things of that kind. In most States the law expressly gives to the State Commission the power to order any spurs, sidings, or industry tracks when the public convenience and necessity require. * * * It is purely a local question. The commissions are constantly appealed to for that sort of a facility. It is a thing that is frequently taken care of by negotiation * * * It would not do, in our judgment, to give to the Interstate Commerce Commission the power to pass upon these purely local matters and to deprive the people of the State of any service which they get from their local tribunal.

It has been suggested by Commissioner Jackson, of Wisconsin, that the same power might be extended to street car companies which under the law are compelled to make extensions by order of the city council. In some cases street car companies may come under the provisions of this act, because they handle freight and joint traffic with interurban lines and with railroads, and because of that provision we believe that the section ought not to apply to street car companies at all."

Continuing (page 1613), Mr. Elmquist said:

"There are a great many electric interurban lines, the average length of which in this country is about 48 miles. Generaly speaking, they perform a local service under the laws of the State. They are subject to the regularatory powers of the local commissions. We can see no good reason for transferring to the Interstate Commerce Commission the power to determine the extension or the abandonment of those lines which are specially designed to take care of local service. You are trying to take care of evils or injuries and it strikes us that you are imposing a greater hardship upon the public, and, perhaps, upon the industry itself, in asking the interested bodies to come here to Washington to have those matters disposed of."

(End page 17.)

There were no substantial hearings on S. 2906 by the Senate committee, and consequently all communications and comment received theeron were considered by the House. Section 32 of this bill contained the following provision:

"That the authority of the Board (Transportation Board) conferred by this section shall not extend to the construction or abandonment of sidetracks, spurs, industrial, team or switching tracks, street car and electric interurban lines located or to be located wholly within one State."

(536) In connection with the consideration of S. 2906, a committee of the American Electric Railway Association addressed a letter to Senator Cummins suggesting certain amendments thereto, which was referred to the House committee and made a part of the hearings (p. 3418, Vol. III).

The principal amendment suggested in this letter proposed that—

"None of the provisions of this Act, except sections 33 to 38, both inclusive, and sections 40 to 47, both inclusive, shall apply to so-called 'street, suburban, or interurban electric railways'."

Inasmuch as Section 32 of S. 2906 contained language hereinbefore quoted, excluding electric railways from its provisions, the principal amendment of the Electric Railway Association was tautological, and a necessary perfecting amendment to the bill was suggested, which proposed that the words 'street car and electric interurban lines" be stricken from said Section 32.

(End page 18.)

There was pending then before the House committee in connection with the general subject of extensions and abandonments by electric lines, the amendment and argument of Mr. Elmquist; the exclusion language of Senate bill 2906; and the amendment offered by the American Electric Railway Association.

That the suggested amendments were meritorious and met with the approval of the House committee, is best evidenced by the fact that when H. R. 10453 was reported to the House of Representatives it contained in section 402 thereof the following exclusion language:

"The authority of the commission conferred by paragraphs (7) to (20), both inclusive, shall not extend to the construction or abandonment of * * * street car and electric interurban lines, located wholly within one State."

(537) The report of the committee accompanying the bill contained the following statement:

"* * * Section 402 further provides that extensions of an existing railroad or the construction of a new line or the abandonment of a line shall not be permitted unless and until there shall have been obtained from the commission a certificate * * *. A like provision can be found in the statutes of a number of States. Your committee believes that the requirement of such a certificate, so far as extensions are concerned, will tend to stabilize existing conditions and prevent the construction of unnecessary or parallel lines which, without any reasonable hope of profitable operation, would become a burden to the public. A similar provision in the laws of (End page 19) several States has proven successful in preventing the construction of weak lines. This provision of the bill, however, does not extend to the construction or abandonment of sidetracks, or of spur, industrial, team, or switching tracks, or of street car and electric interurban lines, if such tracks or lines are located or are to be located wholly within one State."

When the bill (H. R. 10453) was up for consideration in the House of Representatives, Mr. Esch, on November 11, 1919, said:

"We provide that there shall be some Federal control over the matter of abandonment, so that cities and villages that have been built up on these lines can be given due consideration by the regulatory body before

the order for abandonment is issue. We give such control to the commission to investigate the situation and determine the facts. But neither provision, the building of new lines or the abandonment of old ones, affects spurs or switches or terminal tracks or interurban lines wholly within a State. These we leave to State control, where they already belong" (p. 8316-CR, Vol. 58, Pt. 8).

Debate in the House brought up the subject of "States' rights" and their proposed violation by certain provisions of H. R. 10453, particularly with reference to the construction and abandonment of lines of railroad. Also the "car service" section.

(End page 20.)

(538) On November 14, 1919, Mr. Hudspeth of Texas offered for information an amendment to H. R. 10453, proposing to strike from the bill those sections relating to car service, construction, and abandonment of lines. In speaking on this amendment he made the following statement:

"Mr. Chairman and gentlemen of the committee, my original purpose was to strike out the sections of this bill that refer to the distribution of cars by the Interstate Commerce Commission and that provide for the abandonment of railroads at the instance of the Interstate Commerce Commission.

"My purpose in offering this amendment is to restore to the States the rights that they have had under State constitutions and laws and under the railroad commissions of the several States. (Applause) That is the purpose of my amendment. The gentleman from Wisconsin (Mr. Esch) made the statement that this amendment would hamstring the Federal Government. I want to be candid with you, gentlemen, and I say that when the Federal Government takes away the rights delegated to the States under the Constitution of this Republic and reserved to the people of the several States, I want to hamstring the Federal Government in the interest of my State and its State laws. That is my purpose. * * *

"I am opposed to these provisions in subdivision 17, which provide that the Interstate Commerce Com-

mission, 3,000 miles from my district, can issue a decree that a railroad shall be abandoned, that its tracks shall be taken up, in the face of a statute in my State which provides that it can not be done except upon a bill presented to the legislature and passed by that body. I say when you provide that upon a decree of the Interstate Commerce Commission the railroads can be abandoned, and that every person desiring to organize a corporation for the building of a railroad shall come to Washington, 3,000 miles away, and show the necessity for that road to the Interstate Commerce Commission, it means, I will say to my friends who represent the Panhandle of Texas, that if you pass this bill it means the death to the building of every railroad in the Panhandle of Texas.

* * * * * * *

(End page 21.)

"This is the provision in section 16 that the gentleman from Wisconsin says if amended will hamstring the Federal Government. Let us hamstring the Federal Government and get back to States rights where the people rule, bring the government home to the people, and not centralize it in Washington. (Applause.) That is what the bill does, my friends, centralizes the power in Washington for the making of rates; and it will cause everybody to come here and file his claim 3,000 miles away. (Applause) My God, gentlemen, have we lost all confidence in our local tribunals to make our laws and fix our freight rates? I, for one, have not. (Great applause) (Page 8531, C. R., vol. 58, Pt. 9.)

(539) Mr. Dickinson, of Missouri, then offered a series of amendments to perfect sections 17, 18, and 19 of the bill relating to extensions and abandonments. In the course of the debate on these amendments Mr. Sanders, of Louisiana, made a statement before the Committee of the Whole House:

"* * * You might as well understand, gentlemen of the committee, that these sections—from 17 down to 21, inclusive—absolutely wipe out every State line in these United States, in so far as the control that has

heretofore been exercised by State commissions is concerned.

"Do not make any mistake, gentlemen. When my friend, the gentleman from Kentucky (Mr. Barkley) says these paragraphs refer only to roads that come under this act, he is right. Yet every road that ever ships a carload interstate comes under this act. Therefore there is not a mile of railroad in America but what comes under these sections. Remember that. Adopt them if you want to. You can not build a mile of railroad anywhere in America (End of page 22) without getting the consent of the Interstate Commerce Commission.

"If they want to tear up a mile of road, they will no longer apply to State commissions, that understand the conditions and surroundings, but they will come away up here to Washington and get permission to do it.

"Look at paragraph 21, gentlemen. It reserves to the State commissions the magnificent power of controlling spur tracks alone in the future! They have taken all the teeth out of the State commissions. They have robbed them of all their power and all their control. But, thank God, they still let them control spur tracks! Thank God, they still have the right to attend their own funeral, and the people whom they heretofore served may act as pallbearers.'" (Applause). (Page 8534, C. R., vol. 58, Pt. 9.)

As a substitute for the Dickinson amendments, Mr. Jones, of Texas, then offered an amendment striking from the bill all of section 402 which related to car service, extensions and abandonments, and in support of his amendment said:

"In the first place, I do not believe it is practicable for the Interstate Commerce Commission to act upon all of the requests for cars all over the United States and not get the thing mixed up.

"The second reason is the fact that not a single line of railway in the United States can be extended under subsection 17 of the proposed bill without getting the authority of the Interstate Commerce Commission. That means in most of the outlying sections that they will have to go to a tremendous expense in order to get permission to construct those lines of railway.

* * * * * * *

(540) "Again, the proposed section also provides that before a railway can be extended one mile, and before a single yard of new railway may be (End of page 23) constructed, the consent of the Interstate Commerce Commission must be secured. A company may have the money to build. The community may need it. But a delegation must get on the train and come to Washington to get permission before they can lay a rail or drive a spike. And if they refuse consent that community must continue to use wagons. Where is all of this foolishness going to end? Since when has it become wise to require the business men to come East to get permission to spend their own money? Gentlemen, this is a national question, but the Nation is interested in protecting the just rights of every locality. The finest way to do that is to leave business and different sections as untrammeled as possible. The people of my country know better than any far-off commission when they need and want to build a new transportation line or extend an old one. I have county seats that are 40 miles from the railroad. I love that country and its people, and it is one of my dreams to see new lines of railway throughout that great scope of country. But if this section of the bill remains unmodified I fear that years from now many of our county seats will still be miles from any line of railway. All we ask is that you give us a chance—a broad, big, American chance." (Applause) (Pages 8534-5-6, C. R., vol. 58, Pt. 9.)

Mr. Stevenson of South Carolina then offered an amendment to paragraph (21) of section 402, which was later withdrawn when Mr. Esch proposed an amendment, the purpose of which was to eliminate from the paragraph the words "sidetracks, or of spur, industrial, team or switching tracks, or street car and electric interurban lines, when such tracks or lines are located or to be located wholly within one State."

(End of page 24.)

This amendment was agreed to without extended debate, and the paragraph as amended then read as follows:

"The authority of the Commission conferred by

paragraphs (17) to (20), both inclusive, shall not extend to the construction or abandonment of any line located or to be located wholly within one State or to any street car or electric interurban line.'

The above quoted language was in the bill as it passed the House of Representatives.

(541) With the adoption of this amended paragraph, however, debate on the general subject continued, and Mr. Parrish of Texas offered an amendment striking from section 402 of the bill paragraphs 15 and 16 which related to car service and during the course of his remarks said:

"If you will adopt the amendment I offer, it will have the effect to save to the State railroad commissions some authority at least in the matter of making rates, especially as to intrastate shipments.

"The bill as a whole is further objectionable because it vests to the Interstate Commerce Commission the absolute authority to grant permits to remove tracks or to build new roads and takes away from the State commissions jurisdiction in such matters. This, in effect, will mean that in Washington authority will be lodged which will require that all those who desire to extend a road must present their case at Washington, and if perchance a road should, according to the orders of the Interstate Commerce Commission, (End of page 25) become undesirable, this commission would have absolute authority to take up the road, regardless of any law or decision of the State in which the property was situated, and this is a further blow at the power and jurisdiction of the several States, and is a radical change from the existing laws and further tends to centralize in Washington matters that should be left to the States and to local tribunals for the solution according to their own needs and about which the Interstate Commerce Commission by reason of the very circumstance can know so little.

"Then, too, the bill is objectionable because it destroys in effect the stock and bond laws of the States and puts this matter entirely in the hands of the Interstate Commerce Commission, whether the property in question

be intra or interstate, and this provision strikes down the laws of the State of Texas, which we have been building and perfecting for many years, and which have reached that stage of perfection which appeals strongly to the pride of every Texas citizen." (Page 8540, C. R., vol. 58, Pt. 9.)

The Parrish amendment was not agreed to, and thereafter Mr. Dickinson of Missouri offered an amendment striking from the bill paragraphs 17, 18, 19, 20, and 21 of Section 302, all of which related to the subject of extension and abandonment of lines. The amendment was rejected. (Page 8541, C. R., vol. 58, Pt. 9.)

(End of page 26.)

(542) Mr. Mooney of Ohio offered an amendment to paragraph (17) of section 402 of the bill, proposing to strike from the paragraph that language relating to the extension and construction of new lines of railroad, and in support of his amendment said:

"Further than that, Mr. Chairman, I want to say, and with the very greatest respect to the chairman of the committee, that, if my judgment is correct, because of his amendment to section 21, under this bill railroads engaged in interstate commerce may not have the right to make sidetrack extensions or the extension of a spur without permission of the Interstate Commerce Commission. I am very much afraid that is true under the amendment just adopted."

Mr. ESCH:

"No. I think the gentleman misconstrues that language. The language in the original section 21 did refer to the construction of spurs and sidings, and so on, but we eliminated those because we put in broader language—'all railroads and interurban lines', which, of course, includes spurs and sidetracks and things of that kind."

Mr. MOONEY:

"I did not understand that the intention was there. I am fearful that you have really given an additional

power and authority which even you had not intended to give." * * *

(Page 8543, C. R., vol. 58, Pt. 9.)

From the above quoted language it would appear that Mr. Mooney entertained some misgiving as to the power which would be lodged in the Interstate Commerce Commssion, and in reply to (End page 27) the statement of Mr. Mooney, Mr. Esch, chairman of the committee in charge of the bill said:

"Mr. Chairman, I move to strike out the last word. In view of the adoption of the amendment which I offered to lines 13, 14, 15, and 16, on page 53, which would take from the Interstate Commerce Commission the power over extensions of lines built or to be built wholly within a State, it seems to me that the objections made by gentlemen do not longer obtain. It is but right that interstate construction should be in the hands of Federal authority. If not, you would have conflicting State jurisdictions. This is not a new matter. There are a number of States that will not permit the extension of lines without securing a certificate of convenience and necessity. Great States like New York have such power, and the effect has been salutary in that it prevented the construction of parallel lines, thus preventing two weak lines where one strong line would serve the public. It has also prevented the construction of weak lines that make a burden on the people. It seems to me, gentlemen, we have safeguarded this in every respect." (Page 8543, C. R., vol. 58, Pt. 9.)

(543) The question being taken, the amendment of Mr. Mooney was rejected.

Attention is now directed to the provisions of S. 3288, which bill was reported by the Committee, considered, and passed by the Senate. The report of the chairman of the Committee accompanying the bill contained the following:

(End page 28)

"There are in the bill many amendments to the

act to regulate commerce remedying defects which have been disclosed in the administration of the present law. * * *"

During the general explanation of the bill Senator Cummins said:

"But I do not want it to be understood that we have yet gone, and this bill does not propose to go, to the limit of our constitutional power. It leaves with the State authorities many things which, in my judgment, if we were to exercise our full power we could withdraw from the States. But the committee has not considered it wise to withdraw more than seemed to be absolutely necessary under existing conditions. * * *"

(Page 143, C. R., vol. 59, Pt. 1.)

Section 34 of S. 3288, relating to the construction, extension, and abandonment of lines of railroad contained a proviso of exclusion identical with that contained in Sec. 32 of S. 2906, as follows:

"That the authority of the Board (Transportation Board) conferred by this section shall not extend to the construction or abandonment of sidetracks, spurs, industrial, team or switching tracks, street car and electric interurban lines located or to be located wholly within one State."

(End page 29)

(544) However, on December 15, 1919, Senator Watson (Indiana) offered an amendment to this provision, striking out the words "street car and electric interurban lines" and inserting after the word "state", the following:

"or street, suburban, in interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation." (Page 587, C. R., vol. 49, Pt. 1.)

The amendment was accepted by Senator Cummins and adopted by the Senate without debate. The provision as amended then read as follows:

"*Provided further*, That the authority of the (Transportation) Board* conferred by this section shall not extend to the construction or abandonment of side tracks, spurs, industrial, team or switching tracks, located or to be located wholly within one State, or street, suburban, or interurban electric railways which are not operated as a part or parts of a general steam raiload system of transportation."

The above exclusion language was contained in the bill as finally passed by the Senate and submitted to the conference committee; although on December 17, 1919, Senator Smith (South Carolina) submitted an amendment striking from the bill all of section 34 relating to construction and abandonment of lines, and in support of his amendment said:

(End page 30)

"This bill proposes that all construction, both as to the extension of old lines and the building of new lines, shall be at the behest, at the sufferance of a transportation board in Washington. If we were a standardized country, if we had practically a sufficient amount of railroads in this country, a sufficient vast majority of the outlying territory, it might be very well then for us to pass restrictive legislation looking toward preventing the still further burdening of the public with unnecessary railroads. But what we need at this time is more railroads; to provide the machinery for their proper supervision as to the issuance of securities and the overcharging of rates and fares, but not to discourage the buildings of railroads." * * * But when it comes to the question of whether or not my community shall be developed at the behest of a Federal board, I think

*Note: The Senate Bill provided for the creation of a Federal Transportation Board, to which Board a part of the duties of the Interstate Commerce Commission were to be transferred.

the sovereignty of the States and the communities and the individuals yet should have some place. * * * Therefore the passage of the bill in the form in which it now is means the stoppage of any further railroad construction, certainly voluntary railroad construction." * * * (C. R., pages 747-748, vol. 49, pt. 1.)

(545) Intermittent debate continued for several days on the amendment proposed to Sec. 34 of S. 3288, and on December 18, 1919, Senator Smith said:

"Mr. President, I sincerely hope that on this proposed amendment the little modicum left to develop the undeveloped territory of the United States shall not be shackled, hindered, and restricted by having to pay men's expenses to come all the way to Washington, take off their hats, and bow their knees to a *broad* of five too know whether or not a rich and a productive section shall be opened up by this means of transportation. * * *" (C. R., pages 827, vol. 49, pt. 1.)

(End page 31.)

On December 19, 1919, Senator Robinson (Arkansas) speaking in opposition to the amendment said:

"Much as I regret to disagree with my friend the Senator from South Carolina, I feel it to be my duty to urge the Senate to reject his amendment and to retain the provision in the bill. It is in harmoney with some of the general and important features of the bill, particularly those relating to the consolidation of railway lines and systems. It recognizes the public right as controlling in the construction of new lines of railroad and in the abandonment of existing lines of railroad. It provides that no new lines shall be constructed, no old lines shall be extended, until a certificate has been issued by a board representing the public * * *" (C. R., page 862, vol. 59, pt. 1).

Thereupon Senator Curtis (Kansas) addressed Senator Robinson as follows:

"I wish to ask the Senator if his construction of that provision is to the effect that if parties in a State desire to build a line from one place to another in the State and the State utilities commission or railroad board favor such construction, under those circumstances they would still have to get a permit from this board?"

Mr. ROBINSON: "If the road is to engage in interstate commerce, I feel sure that that is the case, and I think it should be the case. The power of Congress, as the Senator well understands, is limited to the regulation of interstate commerce."

Mr. CURTIS: "I understand that; but the question I I ask is with reference to a road wholly within a State. Although the road might be connected with a line that would take freight outside of the State, by agreement probably with other roads, the road would be wholly within the State. In my judgment, where a road is wholly within the State the railroad board of the State or the utilities commission should have authority to pass upon the necessity of constructing such a road." (C. R., p. 862, vol. 59, pt. 1.)

(End page 32.)

The question being taken, the amendment of Senator Smith was rejected.

(546) Senate Bill 3288 was substituted for House Bill 10453 on December 19, 1919 (C. R., p. 884, vol. 59, pt. 1) and upon its passage in the Senate on December 20, 1919, was sent to conference.

The conference committee report was made on February 18, 1920, (H. Rept., 650—66th Congress) and contained the following paragraph:

"(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

The statement of the managers on the part of the House accompanying the conference reports made the following explanation of the above quoted paragraph:

"The House bill, in section 402, provided that the authority of the commission over the construction and abandonment of lines of railroads should not extend to any line located or to be located wholly within one State, or to any street car or electric interurban line. The Senate amendment specified that the authority of the transportation board in this connection—

'should not extend to the construction or abandonment of sidetracks, spurs, industrial, team, or switching tracks, located or to be located wholly within one State, or street, suburban, and interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation'.

(End page 33.)

"Section 402 of the conference bill adopts the Senate provision, substituting the commission, for the transportation board, however."

The conference report was adopted by each of the Houses without amendment, and the exclusion paragraph just quoted is the existing law of today.

(End page 34.)

## FINAL DECREE.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
(547) WESTERN DISTRICT OF SOUTH CAROLINA.

Interstate Commerce Commission, Southern Railway Company, Charleston & Western Carolina Railway Company, Louisville & Nashville Railroad Company, Carolina, Clinchfield & Ohio Railway, Carolina, Clinchfield & Ohio Railway of South Carolina, and Clinchfield Northern Railway Company of Kentucky, Plaintiffs,
*vs.*
Piedmont & Northern Railway Company, Defendant.

In Equity No. 253

This cause came on to be heard by this court on final hearing at this term, upon the evidence of all the parties hereto, and was argued by counsel for all the parties orally and in briefs, and thereupon, upon consideration thereof the court made and filed its special findings of fact and its conclusions of law accompanied by its written opinion.

On consideration whereof, it is now ordered, adjudged and decreed as follows:

1. Defendant, its officers, agents, employees and attorneys are permanently restrained and enjoined from extending its present lines of railroad by the further prosecution of any construction of a new line or lines of railroad from Spartanburg, South Carolina, to Gastonia, North Carolina, or from Charlotte, North Carolina, to Winston Salem, North Carolina, unless and until there shall first have been obtained from the Interstate Commerce Commission a certificate that the present or future public convenience and necessity require or will require the construction of such additional or extended line of railroad.

(548) 2. It is further ordered, adjudged and decreed

that the plaintiff and the intervening plaintiffs recover of defendant their costs herein to be taxed by the clerk.

Dated June 9, 1931.

Rock Hill, S. C.

(Signed) J. LYLES GLENN,
District Judge.

The defendant in apt time duly excepted to the foregoing decree and to each and every part thereof; and also in apt time duly excepted to the findings of fact and conclusions of law therein referred to and to each of said findings of fact and conclusions of law.

Dated June 9, 1931.

(Signed) J. LYLES GLENN,
District Judge.

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF
(549) SOUTH CAROLINA, IN THE DISTRICT COURT.

Interstate Commerce Commission; Southern Railway Company; Atlantic Coast Line Railroad Company; Charleston & Western Carolina Railway Company; Louisville & Nashville Railroad Company; Carolina, Clinchfield & Ohio Railway, Carolina, Clinchfield & Ohio Railway of S. C., & Clinchfield Northern Railway of Kentucky, Plaintiffs,
*vs.*
Piedmont & Northern Railway Company, Defendant.

Equity #253.

**JOURNAL ENTRIES.**

April 16, 1930 Filing Bill; Issuing Subpoena—Copy of Judge.
" " " 2 Certified Copies for Service.
" 18 " Filing U. S. Marshal's Return on Subpoena.

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| " | " | " | Filing U. S. Marshal's Bill of Costs. ($2.00). |
| " | 30 | " | Flg. Motion to strike out Paragraph 5 of Bill—Copy for Judge. |
| " | 30 | " | Filing Answer of Defendant—Copy for Judge. |
| May | 9 | " | Flg. Petition for leave to Intervene & Bill of Intervention of Sou. Rwy., et al.,—Copy for Judge, |
| " | 9 | " | Flg. Notice of Lodgment of Petition for leave to Intervene and Bill of Intervention & Notice of Hearing on Petition to Intervene—Copy for Judge. |
| " | 19 | " | Filing & Entering Order allowing Plaintiff to Amend Complaint—copy for Judge. (M. P. 3374). |
| " | 19 | " | Filing Amended Bill of Complaint—Copy for Judge. |
| " | 19 | " | Filing & Entering Order allowing Southern Rwy. Co. et al to Intervene—Copy for Judge. |
| " | 19 | " | At hearing before the Court Plaintiff presents Motion to be allowed to file an Amended Complaint. Motion argued, Court grants Order to allow the filing of Amended Complaint, with Defendant's rights reserved to renew its Motion to Strike Plaintiff presents Petition for certain Railways to be allowed to intervene as Parties Plaintiff. Intervention allowed with Defendant's right reserved to move to strike out any parts of Interveners Petition. |
| May (550) | 29 | 1930 | Filing Supplemental Answer of Defendant—Copy for Judge. |
| " | 29 | " | Filing Motion of Defendant to strike out Paragraph V of Amended Bill of Complaint as Impertinent—Copy for Judge. |
| " | 31 | " | Filing Motion of Defendant to strike out Parts of Bill of Intervention and Complaint of Southern Ry. Co. et al. —Copy for Judge. |

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|---|---|---|---|
| June | 9 | " | Filing Answer of Defendant to the Bill of Intervention & Complaint of the Southern Ry. Co., et al.—Copy for Judge. |
| " | 9 | " | Hearing before the Judge, without a Jury on Motions to Strike herein. Court reserves his decision—same to be handed down later. |
| " | 10 | " | Certified Copy of Order Allowing certain Railways to Intervene—to Alderman & Knowlton 1.10 ea. |
| " | 10 | " | Certified Copy of Motion of Defendant, etc., 8 c ea. to Alderman & Knowlton. |
| " | 10 | " | Certified Copy of Motion of Defendant to Strike out Par. V etc., to Alderman & Knowlton—95 ea. |
| " | " | " | Certified Copy of Order Allowing Amended Bill to be Filed—to Alderman & Knowlton—80 ea. |
| " | 10 | " | Certified Copy of Supplemental Answer to Alderman & Knowlton—1.35 ea. |
| Sept. | 6 | " | Filing & Entering Order—Copy for Judge (M. P. 4020). |
| " | 6 | " | Certified Copy of Order to Knowlton & Alderman. |
| " | 6 | " | Certified Copy of Order to Atty. Gen. & U. S. A. |
| " | 20 | " | Filing Exceptions of Interstate Commerce Commission. |
| " | 20 | " | Copy to U. S. Judge. |
| Oct. | 16 | " | Filing & Entering Order for Special Session of October Term for trial of this case (M. P. 5438). |
| " | 17 | " | Issuing 2 W. & 3 T. for Southern Ry. |
| " | 20 | " | Filing & Entering Return of U. S. Marshal on 2 Subpoenas. |
| " | 20 | " | Filing U. S. Marshal's Bill for Southern Ry. 50c. |
| " | 20 | " | Filing U. S. Marshal's Bill for Southern Ry. 1.00. |
| " | 20 | " | Hearing at Spartanburg, S. C., before Judge J. Lyles Glenn (M. P. 5440). |

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| " | 22 | " | Issuing 1 W. 1 T. for Southern Railway. |
| Nov. (551) | 1 | 1930 | Briefs to be filed by Dec. 10, 1930, by either side. |
| " | " | " | Filing Exhibits of I. C. C.—*Envelops* 1, 2, 3, 4, 5, 6, 10. |
| " | 4 | " | Filing Exhibits of Plaintiff Intervener—Envelope 7, Exhibits 1 to 18. |
| " | 4 | " | Filing Exhibits of Defendant—Envelope 8, Exhiibt A, thru Z—A1 Z1 & A2. |
| " | 4 | " | Filing Exhibits of Defendant—Envelope 9, Exhibit H1-I1-J1. |
| " | 4 | " | Copy of Order of 16 to Judge and U. S. Marshal. |
| Dec. | 9 | " | Filing Brief of I. C. C.—6 copies. |
| " | 9 | " | Filing Intervening Plaintiff's request for Findings of Fact, etc.—2 copies. |
| " | 9 | " | Filing Brief for Intervening Plaintiffs 2 copies. |
| " | 10 | " | Filing Argument of W. S. O'B. Robinson, et al—3 copies. |
| Jan. | 5 | 1931 | Filing Copy of Reply Brief of Intervening Plaintiffs. |
| May | 23 | " | Filing & Entering Opinion (M. P. 7322-53). |
| " | 23 | " | Filing & Entering Findings of Fact & Conclusions of Law (M. P. 7353). |
| " | 23 | " | Filing Note filed with Opinion & referred to therein (M. P. 7352). |
| " | 29 | " | Certified Copy of Opinion, Findings of Fact & Note to S. S. Alderman—charge M/E. |
| June | 8 | " | Certified copy Opinion, Findings of Fact & Note to R. B. Bradley and W. S. O'B. Robinson—charge M/E. |
| " | 9 | " | Filing & Entering Final Decree (M. P. 7537)—Copy for Judge Glenn. |
| " | 10 | " | Certified Copy of H. & H.—charge M/E. |
| " | 10 | " | Certified Copy to Atty. Gen. & D. W. Knowlton (no chag.) Certified Copy to W. S. O'B. Robinson—charge M/E. |
| " | 10 | " | Certified Copy to S. S. Alderman for Southern Railway. |
| " | 18 | " | Certified Copy of Opinion, etc. and Decree to W. C. Burgess—charge M/E. |

July 7 " Flg. & Entg. Order extending time in which to File Praecipe & Statement of Evidence (M. P. 7652) Copy for Judge.

July 18 " Filing Intervening Plaintiff's Request for Findings. Fact and Conclusions of Law—Rec'd from Judge Glenn.

" 20 " Filing Defendants Request for Special Findings of Fact—Rec'd from Judge Glenn.

" 21 " Filing & Entering Order Amending Caption of Final Decree 2 copies for Judges (M. P. 7744).

" 21 " Certified Copy to D. W. Knowlton & Atty. Gen.—n/chg.

" 21 " Certified Copy to W. S. O'B. Robinson, S. S. Alderman, W. C. B., R. R. B., H. & H.—no charge.

July 21 1931 Filing & Entering Order Extending Time
(552) to File Praecipe and Statement of Evidence (M. P. 7765) Copy for Judge.

Aug. 1 " Filing & Entering Order Directing Exhibits to be transmitted to Circuit Court of Appeals (M. P. 7769)—copy of same.

" 8 " Filing Petition for Appeal—Copy of same.

" 8 " Filing Assignment of Error—Copy of same.

" 10 " Filing & Entering Order Allowing Appeal (M. P. 7851).

" 10 " Filing & Entering Citation in Duplicate (M. P. 7852).

" 12 " Filing & Entering Bond on Appeal & Order of Approval—Copy—(M. P. 7853).

" 15 " Copy of Opinion to Judge.

" 15 " Copy of Findings of Fact to Judge.

" 15 " Copy of Note Filed with Opinion to Judge.

" 15 " Copy of Final Decree to Judge.

" 26 " Filing Acceptance of Service of Citation.

" 28 " Filing Acceptance of Service of Citation —C. H. Davis.

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| Sept. | 3 | " | Filing Acceptance of Service of Citation—McLaughlan. |
| " | 3 | " | Filing Statement of evidence under Rule 75 (b). |
| " | 4 | " | Filing Acceptance of Service of Citation —Burger. |
| " | 7 | " | Filing Acceptance of Service of Praecipe for Transcript of Record and of Defendant's Statement of Testimony, etc. |
| " | 12 | " | Filing & Entering Order Extending Time for Filing Counter Praecipe, & for Filing Objections or Amendments to the Narrative & Condensation of Evidence by *Appeles*—Copy for Judge (M. P. ). |
| " | 12 | " | Certified Copy to D. W. Knowlton N/C —1 Certified Copy to S. S. Alderman. |
| " | 12 | " | Filing & Entering Order Extending Time of Return Day on Citation (M. P. 80098): |
| " | 12 | " | Copy for Judge. |
| Oct. | 2 | " | Flg. Objections & Amendments by Pltfs. *Appelles* to the Statement of testimony under Rule 75 (b) Filed by Dfdts.—Appellant—Copy for Judge. |
| " | 26 | " | Flg. Statement of Evidence under Rule 75 (b) and Entg. Order Approving (M. P. 9450). |
| " | 27 | " | Filing Stipulation of Counsel agreeing to be governed by Rule 23, of Rules of Circuit Court of Appeal—4th Circuit & also agreeing on contents of record on appeal. |

## ASSIGNMENT OF ERRORS.

(553) (Style of court and Title omitted.)

Piedmont and Northern Railway Company, defendant, now comes by its Attorneys, and in connection with its petition for appeal, files the following assignment of errors on which it will rely on its appeal to the Circuit

Court of Appeals, for the Fourth Circuit, from the final decree of the District Court entered June 9, 1931.

The District Court erred:

I.

In excluding the following testimony of the defendant's witness, A. S. Richey, as shown by defendant's first exception:

The witness qualified as an expert on electric railways, and after having testified as to the development of the electric railway industry in the United States, begin-
(554) ning with its development about 1888, testified that the first lines of electric railway were built along city streets, taking the place of the horse cars, and were known as electric street railways; that street railways then began to extend their lines into the suburbs, and these lines were known as suburban lines; that still further extensions were made between cities and towns, and these were known as interurban railways; that by 1897 several roads in the middle states were constructed on private rights of way with track construction, weight of rail, roadbed, etc., very similar to the steam railroad construction which was common in that territory, and that by 1902 or '03 there were several hundred miles of such construction with 80 pound rail. He was then asked by counsel for defendant:

"Q. Were those roads with the 80 pound rail which you knew about by 1901 or 1903 commonly known and designated in the electrical industry as interurban electric railways?" "A. They were."

Counsel for the plaintiffs objected to this question, but not on the ground that the witness had not qualified as an expert, and the court having sustained the objection and excluded the testimony, the defendant duly excepted.

II.

In excluding the following testimony of the defendant's witness, Richey, as shown by defendant's second exception:

"Q. How were locomotives similar to those which you saw on the Piedmont and Northern usually referred to and described in the electric railway industry prior to 1920? A. They were known as the interurban type of locomotives."

III.

(555) In excluding the following testimony of the defendant's witness, Richey, as shown by defendant's third exception:

"Q. Professor, what is the character of the construction of the Piedmont and Northern Railway? A. As far as I can tell it is an interurban electric railway."

On the objection of the plaintiffs the court excluded this testimony, and the defendant duly excepted.

The court ruled that this evidence is excluded on the ground that this witness, although an expert, cannot in his own words put this railroad into the the legal classification of an interurban.

IV.

In excluding the following testimony of the defendant's witness, Richey, as shown by the defendant's fourth exception:

"Q. Professor, what is the character of the equipment of the Piedmont and Northern Railway? A. It is distinctly interurban in character."

On the objection of the plaintiffs the court excluded this testimony, and the defendant duly excepted.

V.

In excluding the following testimony of the defendant's witness, Richey, as shown by the defendant's fifth exception:

(556) "Q. What is the character and method of the operation of the Piedmont and Northern? A. The character and method of operation are distinctly interurban."

On the objection of the plaintiffs this testimony was excluded, and the defendant duly excepted.

VI.

The court erred in making its special findings of fact, in finding and stating only those facts tending to show the respects in which defendant's railway resembles steam railroads, and in not finding and stating the facts, established by the uncontradicted or greater weight of the evidence, differentiating defendant's railway from steam railroads and establishing its classification as an interurban electric railway, particularly that the voltage, sub-station capacity, electric motive power, and other electrical equipment and installation of defendant's railway, and the character and maintenance of its roadbed and track, would be unsuitable for electrified divisions of steam railroads, or for a railroad with a long haul heavy load traffic; that if defendant were to change its road and equipment so as to haul larger trains and use larger locomotives, (such as those used on electrified divisions of steam railroads), the whole road would have to be revised and the existing sub-stations abandoned and others re-built; that defendant's railway was designed, constructed and equipped to operate, and does operate, its passenger cars and freight trains in small units and at frequent intervals; it connects and ties in with the street railway systems in Gastonia and Charlotte, North Carloina, and in Greenville and Anderson, South Carolina, and operates over them jointly with the (557) local street cars; it uses these systems to pick up and deliver freight within the cities; between the cities and towns its passenger cars make frequent stops, averaging 1.2 miles apart, and freight is picked up and de-

livered and switching performed all along the lines; in the handling of freight no distinction is made between local freight which has both origin and destination on defendant's lines, and interstate or interline freight which is interchanged with connecting carriers; bridge or overhead traffic on defendant's railway is small and inconsequential, as compared with the bridge traffic of steam railroads operating in the same territory; while in recent years there has been a great decrease in defendant's passenger revenue, and a large increase in its freight revenue, so that most of its revenue now comes from freight traffic, this condition has not been brought about by, and has not resulted in, any change in the character of defendant's railway, or in its methods of operation, but has been due to a change in traffic conditions in the territory through which defendant's railway operates.

VII.

The court erred in its first special finding of fact entitled, "Corporate history of the Piedmont and Northern Railway Company", in not finding and stating that defendant's railway was designed, constructed and equipped for the operation of its passenger cars and freight trains in small units and at frequent intervals; that its railway connects and ties in with street railway systems, operates over them jointly with local street cars, and uses them to pick up and deliver freight within the cities; that between the cities and towns its passenger (558) trains make frequent stops averaging 1.2 miles apart and freight is picked up and delivered and switching performed all along its lines; as shown by defendant's request for special findings of fact Nos. VI. and X.

VIII.

The court erred in its second special finding of fact entitled, "Construction—tracks, bridges, roadbed, terminals", in not finding and stating that the voltage used in the operation of the defendant's railway is 1,500 direct current, except that in Charlotte, Greenville and Anderson, 750 volts is used in operating over the street railway systems in these cities, and that all cars and loco-

motives are equipped so that the voltage may be immediately reduced from 1,500 to 750 volts; that on main line electrified sections of steam railroads it is customary to use either 3,000 volts direct current or 11,000 volts alternating current, and that the voltage in use on the defendant's railway would be unfit for a line with a long haul heavy load traffic; that the sub-station capacity of defendant's entire system is 10,600 Kilowatts or approximately 75 Kilowatts per mile, whereas on electrified sections of steam railroads the sub-station capacity is at least 150 and runs as high as 1,000 Kilowatts per mile; and that defendant's signal system is a selective control block system in common use on electric railways known as interurbans, and would not be suitable for use on a main line steam railroad; as shown by defendant's request for special findings of fact No. VIII.

IX.

The court erred in its third special finding of fact (559), entitled, "Mobile equipment, rolling stock, used by Piedmont and Northern Railway Company", in not finding and stating that the electric locomotives in use on defendant's railway are of the type commonly known as interurban electric locomotives; that they are lighter and smaller than those ordinarily used on electrified sections of steam railroads, and would not be suitable or feasible for use on a railroad with a long haul heavy load traffic; that its locomotives are constructed on swivel type trucks, and the motors used on them are similar to those used on passenger cars, except that they are geared so as to give the locomotives greater tractive power with correspondingly less free running speed, and that all of said locomotives are designed and equipped so that they can be used on all parts of defendant's system in all manner of operations, the same locomotive being used for switching and main line operations; as shown by defendant's request for special findings of fact No. IX; and that while its freight yards and freight cars are similar to those of steam railroads, this is generally true in cases of interurban electric railways engaged in the general transportation of freight, and necessarily true in cases of those interurbans who interchange freight with connecting steam railroads.

X.

The court erred in its fourth finding of fact entitled, "An analysis of the traffic handled and the methods of operation", in not finding and stating the respects in which defendant's manner of handling traffic and its methods of operation differ from those of the ordinary steam railroad, as hereinbefore set forth in assignments (560) of error Nos. VI and VII, and as shown by defendant's request for special findings of fact Nos. X, XI, XIV and XV; and in not finding and stating that while as to traffic interchanged with steam railroads defendant does follow the methods followed by such railroads in respect of the solicitation of traffic, the publication of tariffs, membership in traffic organizations, interline settlements, etc., and also that while in the general transportation of freight defendant follows many of the methods followed by steam railroads, yet such methods are common both to steam railroads and to interurban electric railways, and are generally followed by all carriers engaged in the general transportation of freight, and subject to those provisions of the Interstate Commerce Act regulating such carriers.

XI.

The court erred in its fifth special finding of fact entitled, "The probable effect of proposed extensions", in finding that the construction by defendant of the new mileage in question would materially injure the intervening steam railroads; in finding that defendant is owned by the Duke Endowment Trust and other closely allied trusts created by the will of the late James B. Duke, and in giving consideration to this alleged ownership as bearing on defendant's right to construct such new mileage without first obtaining from the Interstate Commerce Commission a certificate of public convenience and necessity; and in finding that the construction of said new mileage would result in the establishment of the numerous through routes referred to in said fifth finding, particularly for the reason that the Interstate Commerce Commission has jurisdiction and authority over the establishment and maintenance of through routes and joint rates, so that no through route or joint rate can be es-

tablished or maintained without the approval of the Commission.

XII.

(561) The court erred in its sixth special finding of fact entitled, "The facts as to the threatened construction", in that the facts stated in said fifth finding, (other than those admitted in the pleadings or stated in the preceding findings of the court), are irrelevant and immaterial.

XIII.

The court erred in its second conclusion of law, which was as follows:

"Defendant is not an 'interurban electric railway' within the meaning of the exception contained in paragraph (22) of section 1 of the Interstate Commerce Act as amended by Transportation Act 1920, and its threatened extensions would not be, and neither of them would be, the extension or construction of an 'interurban electric railway' within the meaning of paragraph (22)."

XIV.

The court erred in its third conclusion of law, which was as follows:

"Defendant is prohibited by said paragraph (18) of said section 1, from constructing either of its said threatened extensions without first having procured a certificate of public convenience and necessity from the Interstate Commerce Commission authorizing such construction."

XV.

The court erred in its fourth conclusion of law, which was as follows:

(562) "Defendant's threatened extension and constructions are subject to be enjoined as matter of law under the provisions of paragraph (2) of section 1 of the Interstate Commerce Act as amended by Transportation Act 1920."

XVI.

The court erred in its fifth conclusion of law, which was as follows:

"Unless defendant's construction of its said threatened extensions be enjoined, the intervening plaintiffs will suffer irreparable injury."

XVII.

The court erred in its eighth conclusion of law, which was as follows:

"The plaintiffs in this case are entitled, as matter of law, to the injunction prayed in their respective prayers for relief."

XVIII.

The court erred in holding that defendant's railway is not an interurban electric railway which is not operated as a part or parts of a general steam railroad system of transportation, within the meaning of Paragraph (21) of Section I of the Interstate Commerce Act.

XIX.

The court erred in entering a final decree in this suit permanently enjoining and restraining the defendant from extending its present lines of railroad by the (563) further prosecution of any construction of a new line or lines of railroad from Spartanburg, South Carolina, to Gastonia, North Carolina, or from Charlotte, North Carolina, to Winston-Salem, North Carolina, unless and until there shall first have been obtained from the Interstate Commerce Commission a certificate that the present or future public convenience and necessity require or will require the construction of such additional or extended line of railroad.

XX.

The decree is against the manifest weight of the evidence.

XXI.

The decree is contrary to law.

Wherefore, appellant prays that the decree of the District Court may be reversed and set aside, with directions that a decree be entered denying the relief prayed by the plaintiff and the intervenors, or either of them, and dismissing the complaint of the plaintiff, and the petition of the intervenors, at the cost of the plaintiff and the intervenors, and for such other and further relief as may be appropriate.

H. J. HAYNSWORTH,
R. S. HUTCHISON,
W. S. O'B. ROBINSON, JR.,
Attoney for Piedmont and Northern Railway Company, Appellant.

**STIPULATION OF COUNSEL AGREEING TO BE GOVERNED BY RULE 23 OF THE RULES OF THE CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT, AND ALSO AGREEING ON THE CONTENTS OF THE RECORD ON APPEAL.**

Filed October 27, 1931.

(564) (Style of Court and Caption of Case Omitted.)

Counsel for all parties in the above entitled cause hereby stipulate and agree to be governed by the terms of Rule 23 of the Rules of the Circuit Court of Appeals, Fourth Circuit, and accordingly agree that the Clerk of this Court shall make up the transcript of the record in this cause and duly transmit the same to the Clerk of the United States Circuit Court of Appeals, for the Fourth Circuit, at Richmond, Virginia, and that said transcript of the record shall be printed under the supervision of the Clerk of that Court in accordance with said Rule 23. It is further stipulated and agreed that the following, in the following order, shall constitute the transcript of the record:

1. Bill of complaint and exhibit attached thereto.

2. Defendant's motion to strike out Paragraph V of the bill of complaint.

3. Answer of Defendant.

4. Amended bill of complaint.

5. Petition for leave to intervene and bill of intervention of Southern Railway Company, et al.

6. Order allowing intervention of Southern Railway Company, et al., and allowing filing of bill of intervention.

7. Motion of defendant to strike out Paragraph V of amended bill of complaint.

8. Motion of defendant to strike out parts of bill of intervention and complaint of Southern Railway Company, et al.

9. Supplemental answer of defendant to amended bill of complaint.

10. Answer of defendant to bill of intervention and complaint of Southern Railway Company, et al.

11. Order of court striking out Paragraph V of the amended bill of complaint and portions of the bill of (565) intervention and complaint of the Southern Railway Company, et al.

12. Defendant's request for special findings of fact.

13. Statement of evidence, with stipulation of counsel agreeing upon same, and approval thereof by the court.

14. Special findings of fact and conclusions of law of the District Court.

15. Opinion of the District Court.

16. Final Decree of the District Court.

17. All journal entries in their appropriate order.

18. Assignment of errors.

19. Memorandum stating the date of the petition for appeal, the date of the order allowing appeal, the date when copy thereof was lodged in the office of the Clerk for the adverse parties, the date, penalty and name of the obligors and condition of the appeal bond, the date of the citation, and the date of the service thereof or of the waiver of such service.

20. This Stipulation.

21. Clerk's Certificate.

This 15th day of October, A. D. 1931.

H. J. HAYNSWORTH,
R. S. HUTCHISON,
W. S. O'B. ROBINSON, JR.,
Attorneys for Defendant, Piedmont and Northern Railway Company.

NELSON THOMAS,
Attorney for Interstate Commerce Commission.

SIDNEY S. ALDERMAN,
Solicitor for Southern Railway Company.

F. B. GRIER,
Solicitor for Charleston & Western Carolina Railway Company.

CARL H. DAVIS,
Solicitor for Atlantic Coast Line Railroad Company.

WILLIAM C. BURGER,
Solicitor for Louisville & Nashville Railroad Company.

JAMES J. McLAUGHLIN,
Solicitor for Carolina, Clinchfield & Ohio Railway, Carolina, Clinchfield & Ohio Railway of South Carolina, and Clinchfield Northern Railway of Kentucky.

(566) **ORDER EXTENDING TIME IN WHICH TO FILE PRAECIPE AND STATEMENT OF EVIDENCE.**

(Filed July 7, 1931.)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

Interstate Commerce Commission, Southern Railway Company, Charleston & Western Carolina Railway Company, Atlantic Coast Line Railroad Company, Louisville & Nashville Railroad Company, Carolina, Clinchfield & Ohio Railway, Carolina, Clinchfield & Ohio Railway of South Carolina, and Clinchfield Northern Railway Company of Kentucky, Plaintiffs,

*vs.*

Piedmont and Northern Railway Company, Defendant.

In Equity No. 253.

WHEREAS, the final decree in the above entitled case was filed June 9, 1931; and,

WHEREAS, it appears that the thirty days period provided by Rule 88 of the District Courts for the Eastern and Western Districts of South Carolina does not provide sufficient time for the attorneys for defendant to prepare and file *Praecipe* and Statement of evidence on appeal;

NOW, THEREFORE, on motion of W. S. O'B. Robinson, Jr., and Haynsworth & Haynsworth, Attorneys for the Defendant, and with the consent of the attorneys for Plaintiffs,

IT IS ORDERED, ADJUDGED AND DECREED That the time for filing the *Praecipe* and Statement of

Evidence on appeal, be and the same is hereby extended Thirty (30) Days in addition to the thirty days provided by Rule 88 of the District Courts for the Eastern and Western Districts of South Carolina.

J. LYLES GLENN,
Judge of the District Court for the
Western District of South Carolina.

July 7, 1931.

We Consent:

HAYNSWORTH & HAYNSWORTH,
W. S. O'B. ROBINSON, JR.,
Attorneys for defendant.

NELSON THOMAS,
Attorney for Interstate Commerce Comission.

L. E. JEFFRIES,
SIDNEY S. ALDERMAN,
Solicitors for Southern Railway Company.

(567) F. B. GRIER,
CARL H. DAVIS,
Solicitors for Charleston & Western Carolina Railway Company, and for Atlantic Coast Line Railroad Company.

WM. C. BURGER,
Solicitor for Louisville & Nashville Railroad Company.

JAMES J. McLAUGHLIN,
Solicitor for Carolina, Clinchfield & Ohio Railway, Carolina, Clinchfield & Ohio Railway of South Carolina, and Clinchfield Northern Railway of Kentucky.

(568) **ORDER EXTENDING TIME IN WHICH TO FILE PRAECIPE AND STATEMENT OF EVIDENCE.**

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

Interstate Commerce Commission, Southern Railway Company, Charleston & Western Carolina Railway Company, Louisville & Nashville Railroad Company, Carolina, Clinchfield & Ohio Railway, Carolina, Clinchfield & Ohio Railway of South Carolina, and Clinchfield Northern Railway Company of Kentucky, Plaintiffs,
*vs.*
Piedmont & Northern Railway Company, Defendant.
} In Equity No. 253.

WHEREAS, the final decree in the above entitled case was filed June 9, 1931; and,

WHEREAS, the thirty-day period provided by Rule 88 of the District Courts for the Eastern and Western Districts of South Carolina did not give sufficient time for the attorneys for defendant to prepare and file *Praecipe* and Statement of Evidence on appeal; and,

WHEREAS by order of this Court dated July 7, 1931, time for filing *Praecipe* and Statement of Evidence on appeal was extended thirty days in addition to the thirty days provided by Rule 88 of the District Courts for the Eastern and Western Districts of South Carolina; and,

WHEREAS, the attorneys for defendant will need additional time in which to prepare and file said papers;

NOW, THEREFORE, on motion of W. S. O'B. Robinson, Jr., and Haynsworth & Haynsworth, Attorneys for the defendant, and with the consent of the attorneys for plaintiffs,

IT IS ORDERED, ADJUDGED AND DECREED that the time for filing the *Praecipe* and Statement of Evidence on appeal, be and the same is hereby extended thirty days in addition to the thirty days provided by Rule 88 of the District Courts for the Eastern and Western Districts of South Carolina, and in addition to the thirty days heretofore granted by this Court.

J. LYLES GLENN,
Judge of the District Court for the
Western District of South Carolina.

July 31st, 1931.

(569) **ORDER DIRECTING EXHIBITS TO BE TRANSMITTED TO CIRCUIT COURT OF APPEALS.**

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

Interstate Commerce Commission, Southern Railway Company, Charleston & Western Carolina Railway Company Louisville & Nashville Railroad Company, Carolina, Clinchfield & Ohio Railway, Carolina, Clinchfield & Ohio Railway of South Carolina, and Clinchfield Northern of Kentucky, Plaintiffs,
*vs.*
Piedmont & Northern Railway Company, Defendant.
} In Equity No. 253.

WHEREAS a number of the Exhibits in the above entitled cause consist of maps and charts which can not very well be reproduced or accurately described; and

It appearing to this Court that it is necessary and proper that said exhibits should be inspected in the Circuit Court of Appeals upon the appeal of this case to that Court;

NOW, THEREFORE, ON MOTION of W. S. O'B. Robinson, Jr., and Haynsworth & Haynsworth, Attorneys for the defendant;

IT IS ORDERED, ADJUDGED AND DECREED that all of the original exhibits in this case, including maps, charts and other papers, referred to in the narrative of evidence and made a part thereof, be transmitted by the Clerk of this Court to the Clerk of the Circuit Court of Appeals at Richmond Virginia, and returned after the disposition of this appeal to the Clerk of this Court.

Dated this 1st day of August, 1931.

J. LYLES GLENN,
Judge of the United States District Court for the Western District of South Carolina.

(570) **ORDER EXTENDING TIME FOR FILING COUNTER-PRAECIPE AND FOR FILING OBJECTIONS OR AMENDMENTS TO THE NARRATIVE AND CONDENSATION OF EVIDENCE BY APPELLEES.**

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

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|---|---|
| Interstate Commerce Commission, Southern Railway Company, Charleston and Western Carolina Railway Company, Atlantic Coast Line Railroad Company, Louisville and Nashville Railroad Company, Carolina, Clinchfield and Ohio Railway, Carolina, Clinchfield and Ohio Railway of South Carolina, and Clinchfield Northern of Kentucky, Plaintiffs, *vs.* Piedmont and Northern Railway Company, Defendant. | In Equity No. 253. |

By consent of counsel for defendant Piedmont and Northern Railway Company, appellant,

IT IS HEREBY ORDERED That the time of plaintiffs, appellees, for filing and serving counter-*praecipe* under Rule 75 (a) and for filing and serving objections

to or amendments to the condensation and narration of evidence on appeal under Rule 75 (b) of the Rules of the Circuit Court of Appeals for the Fourth Circuit, be and it is hereby extended to and including Monday, the 19th day of October, 1931.

This, the 12th day of September, A. D. 1931.

J. LYLES GLENN,
United States District Judge.

Consented to for and on behalf of defendant, Piedmont and Northern Railway Company, appellant.

H. J. HAYSWORTH,
R. S. HUTCHINSON,
W. S. O'B. ROBINSON, JR.,
Solicitors.

(571) **ORDER EXTENDING THE TIME OF RETURN DAY ON THE CITATION.**

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

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|---|---|
| Interstate Commerce Commission, Southern Railway Company, Charleston & Western Carolina Railway Company, Louisville & Nashville Railroad Company, Carolina, Clinchfield & Ohio Railway, Carolina, Clinchfield & Ohio Railway of South Carolina, and Clinchfield Northern Railway Company of Kentucky, Plaintiffs, *vs.* Piedmont and Northern Railway Company, Defendant. | In Equity No. 253. |

An Order having this day been signed by the Court extending time until October 19, 1931, for the Plaintiff Appellees to file and serve Counter-*praecipe*, etc., and additional time, therefore, being required by the Clerk's office for the preparation of the record, it is hereby or-

dered that the Return date on the Citation heretofore issued by the Court, under date of the 9th of August, 1931, be extended for a period of ninety (90) days from September 18, 1931.

J. LYLES GLENN,
United States District Judge.

September 12, 1931.

(572) **MEMORANDUM.**

(1) Petition for Appeal filed Aug. 8, 1931;

(2) Appeal allowed Aug. 9, 1931;

(3) Copy of Order Allowing Appeal lodged for adverse parties. Aug. 10, 1931;

(4) Appeal Bond: Dated Aug. 11, 1931.

Penalty $1,000.00;
Obligors: Piedmont and Northern Railway Company, a Corporation, Principal,
Fidelity and Deposit Company of Maryland, Surety;
Conditioned for costs;

(5) Citation. Dated Aug. 9, 1931. Return, dated Aug. 18, 1931.

(573) **CERTIFICATE OF CLERK.**

DISTRICT COURT OF THE UNITED STATES OF AMERICA,
DISTRICT COURT OF THE UNITED STATES OF AMERICA,

I, D. C. DURHAM, Clerk of the District Court of the United States for the Western District of South Carolina, do hereby certify that the writings annexed to this certificate, composed of Five Hundred Seventy-two (572) sheets, being the Transcript of the Record as agreed upon by counsel in the case of Piedmont and Northern Railway Company, Appellant, vs. Interstate Commerce Commission, Southern Railway Company, Charleston and Western Carolina Railway Company,

Atlantic Coast Line Railroad Company, Louisville and Nashville Railroad Company, Carolina, Clinchfield and Ohio Railway, Carolina, Clinchfield and Ohio Railway of South Carolina, and Clinchfield Northern of Kentucky, Appellees, Docket No. Eq. 253, have been compared by me with their originals on file and remaining of record in my office; that they are correct transcripts therefrom and of the whole of the said originals.

In Testimony Whereof, I have hereunto subscribed my name and affixed the Seal of the said Court at the City of Greenville, in the Western District of South Carolina, this 21 day of November, in the year of our Lord One Thousand Nine Hundred and thirty-one, and of the Independence of the said United States the One Hundred and Fifty-sixth.

(Seal) D. C. DURHAM, Clerk.

## PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 3255.

Piedmont and Northern Railway Company, Appellant,

*versus*

Interstate Commerce Commission, Southern Railway Company, Charleston & Western Carolina Railway Company, Atlantic Coast Line Railroad Company, Louisville & Nashville Railroad Company, Carolina, Clinchfield & Ohio Railway, Carolina, Clinchfield & Ohio Railway of South Carolina, and Clinchfield Northern Railway of Kentucky, Appellees.

Appeal from the District Court of the United States for the Western District of South Carolina, at Greenville.

November 23, 1931, the transcript of record is filed and the cause docketed.

Same day, the original petition for appeal, order allowing appeal, bond, and citation are certified up under Sec. 7 of Rule 14.

Same day, the original exhibits (Documents) are certified up.

Same day, two orders extending the time for the filing of the record and the docketing of the cause are filed.

Same day, the appearance of W. S. O'B. Robinson, Jr., is entered for the appellant.

November 25, 1931, the appearance of F. B. Grier and Carl H. Davis is entered for the appellees Atlantic Coast Line Railroad Company, and Charleston & Western Carolina Railway Company.

Same day, the appearance of Daniel W. Knowlton and Nelson Thomas is entered for the appellee Interstate Commerce Commission.

November 27, 1931, the appearance of L. E. Jeffries and Sidney S. Alderman is entered for the appellee Southern Railway Company.

Same day, the appearance of H. J. Haynesworth and R. S. Hutchison is entered for the appellant.

November 30, 1931, the appearance of James J. McLaughlin is entered for the appellees Carolina, Clinchfield & Ohio Railway; Carolina, Clinchfield & Ohio Railway of South Carolina, and Clinchfield Northern Railway of Kentucky.

December 4, 1931, the appearance of William C. Burger is entered for the appellee Louisville & Nashville Railroad Company.

December 9, 1931, twenty-five copies of the printed record are filed.

**JOINT STIPULATION AND MOTION TO CONTINUE CASE TO APRIL TERM, 1932.**

Filed December 11, 1931.

(Style of Court and Title Omitted.)

The appellant, Piedmont and Northern Railway Company, intends forthwith to petition the U. S. Supreme Court to grant a writ of certiorari, to the end that this cause be certified to the Supreme Court for determination by it before any decree is entered in this court; and the parties have agreed, subject to the approval of the court, that the hearing of the cause in this court be continued, and the time to file briefs postponed pending

action by the Supreme Court on the petition for a writ of certiorari.

The parties, therefore, respectfully request the court to continue this cause until the April, 1932, Term of Court.

This 4th day of December, A. D., 1931.

W. S. O'B. ROBINSON, JR.,
Attorney for Piedmont and Northern Railway Company, appellant.
NELSON THOMAS,
Attorney for Interstate Commerce Commission, Appellee.
SIDNEY S. ALDERMAN,
Attorney for Southern Railway Company, and other intervening plaintiffs, Appellees.

**ORDER CONTINUING CAUSE TO APRIL TERM, 1932.**

Filed December 11, 1931.

(Style of Court and Title Omitted.)

Upon Consideration of the joint stipulation and motion of counsel in the above entitled cause for a continuance, and for good cause shown,

It Is Ordered that the above entitled cause be, and the same is hereby, continued from the January term, 1932, to the April term, 1932, of this Court.

JOHN J. PARKER,
Senior Circuit Judge.

December 11, 1931.

**CLERK'S CERTIFICATE.**

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify

that the foregoing is a true copy of the entire record and proceedings in the therein entitled cause, as the same remain upon the record and files of the said Circuit Court of Appeals.

IN TESTIMONY WHEREOF, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Charlotte, North Carolina, this 27th day of January, A. D., 1932.

(Seal of Court)

CLAUDE M. DEAN,
Clerk U. S. Circuit Court of Appeals,
Fourth Circuit

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 14, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

The Chief Justice took no part in the consideration or decision of this application.

FILE COPY

FILED
JAN 29
CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

# No. 664

PIEDMONT AND NORTHERN RAILWAY COMPANY, PETITIONER,

*v.*

INTERSTATE COMMERCE COMMISSION, SOUTHERN RAILWAY COMPANY, CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY, ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, CAROLINA, CLINCHFIELD & OHIO RAILWAY, CAROLINA, CLINCHFIELD & OHIO RAILWAY OF SOUTH CAROLINA, AND CLINCHFIELD NORTHERN RAILWAY OF KENTUCKY.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

H. J. HAYNSWORTH,
R. S. HUTCHISON,
W. S. O'B. ROBINSON, JR.,
*Counsel for Petitioner.*

(36,478)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

# No. 664

PIEDMONT AND NORTHERN RAILWAY COMPANY, PETITIONER,

*v.*

INTERSTATE COMMERCE COMMISSION, SOUTHERN RAILWAY COMPANY, CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY, ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, CAROLINA, CLINCHFIELD & OHIO RAILWAY, CAROLINA, CLINCHFIELD & OHIO RAILWAY OF SOUTH CAROLINA, AND CLINCHFIELD NORTHERN RAILWAY OF KENTUCKY.

## PETITION FOR A WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

Piedmont and Northern Railway Company, petitioner, prays that a writ of certiorari issue to the United States Circuit Court of Appeals, for the Fourth Cir-

cuit, requiring that, before a decree is entered in that Court, this cause be certified to this Court so that it may review the decree of the District Court of the United States for the Western District of South Carolina, entered in this cause on June 9, 1931, permanently enjoining petitioner from constructing extensions of its lines of electric railway without first obtaining from the Interstate Commerce Commission a certificate that the present or future public convenience and necessity require or will require the construction of such extensions (R. 487).

A.

**Summary Statement of the Matter Involved.**

1. This suit was brought in the United States District Court for the Western District of South Carolina, under Paragraph 20 of Section 1 of the Interstate Commerce Act, as amended by Transportation Act, 1920, 49 U. S. C. A., Sec. 1 (20), and under Section 24, Paragraph 8, of the Judicial Code, 29 U. S. C. A., Section 41, subd. 8, to enjoin petitioner from constructing extensions of its lines of electric railway without first obtaining from the Interstate Commerce Commission a certificate of public convenience and necessity under Paragraph 18, Section 1, of the Interstate Commerce Act (R. 2). It was brought on April 16, 1930. The plaintiffs are the Interstate Commerce Commission, and, by intervention, Southern Railway Company, Charleston & Western Carolina Railway Company, Atlantic Coast Line Railroad Company, Louisville & Nashville Railroad Company, Carolina, Clinchfield &

Ohio Railway, Carolina, Clinchfield & Ohio Railway of South Carolina, and Clinchfield Northern Railway of Kentucky, standard steam railroads serving as interstate carriers in territory served by petitioner's existing lines, and also the territory which would be served by the proposed extensions (R. 73).

2. The question presented is whether petitioner is an interurban electric railway, not operated as a part of a general steam railroad system of transportation, within the meaning of Sec. I (22) of the Interstate Commerce Act, as amended by Transportation Act 1920 (49 U. S. C. A., Sec. I (22)), so as to be entitled to construct and to operate in interstate commerce extensions of its lines of electric railway without first obtaining from the Interstate Commerce Commission a certificate of public convenience and necessity, pursuant to Sec. I, Paragraphs (18) to (21), inclusive, of the Interstate Commerce Act, as amended by Transportation Act, 1920 (49 U. S. C. A., Sec. I (18) to (22), inclusive).

3. The plaintiffs alleged that petitioner is a common carrier by railroad subject to the Interstate Commerce Act, that it is within the scope of the provisions of Paragraph 18 of Section 1 of the Act, and that the new mileage, which petitioner proposes to construct, would be extensions of its lines within the meaning of that paragraph (R. 2, 3, and 4).

Petitioner admits that it is engaged in the general transportation of freight and passengers in interstate commerce, and that the proposed extensions would be operated in such commerce in connection with

its existing lines, and that it is subject to the Interstate Commerce Act, as amended by the Transportation Act of 1920, except those provisions from the application of which interurban electric railways, not operated as a part or parts of a general steam railroad system of transportation are expressly excluded. From these provisions it claims exemption as an interurban electric railway (R. 59, 60).

It alleged that its existing lines are operated exclusively by electricity; that they are not operated as parts of a general steam railroad system of transportation; that they were constructed and equipped and are maintained and operated as lines of interurban electric railway; and that the extensions would be lines of the same character, operated in the same way (R. 65, 66, 67, 103 and 104).

4. The Court heard the case on its merits, found the facts specially (R. 402), stated separately its conclusions of law on the special findings of fact (R. 433), filed a written opinion (R. 435), and, on June 9, 1931, entered a final decree, in conformity with the prayer of the complaint and the prayer of the bill of intervention of the intervening plaintiffs, permanently enjoining petitioner from constructing the proposed extensions unless and until it first obtains from the Commission a certificate of public convenience and necessity (R. 487). Petitioner duly appealed to the United States Circuit Court of Appeals, for the Fourth Circuit (R. 511). The transcript of the record was filed in that Court on November 23, 1931, and on December 11, 1931, the Court entered an order continuing

the hearing of the cause until the April 1932 Term of the Court (R. 515). This order of continuance was made upon the joint stipulation and motion of the parties in order that petitioner might have an opportunity to present to this Court this petition for a writ of certiorari (R. 514).

5. Petitioner now owns and operates two separate and distinct lines of electric railway, one a line in South Carolina, extending from Greenwood to Spartanburg, a distance of 89 miles, with a branch from Belton to Anderson of 11 miles, and the other a line in North Carolina, extending from Gastonia to Charlotte, a distance of 23 miles, with a branch to Belmont of 3 miles (R. 404). In March, 1927, it was about to undertake the construction of two extensions, one a line from Spartanburg, the present northern terminus of its South Carolina line, to Gastonia, the present southern terminus of its North Carolina line, a distance of 53 miles connecting the two existing lines, and the other an extension from Charlotte to a new northern terminus at Winston-Salem, North Carolina, a distance of 75 miles (R. 125). The Interstate Commerce Commission notified petitioner that it would be expected to make appropriate application for a certificate of public convenience and necessity authorizing the construction of these extensions, and that such application might be filed without prejudice to petitioner's claim of exemption as an interurban electric railway under Sec. I, Paragraph (22), of the Interstate Commerce Act. Petitioner, duly saving and reserving its claim of exemption, did file application for

such certificate. After a hearing the Commission, on April 3, 1928, denied petitioner's claim of exemption, and also denied the certificate on the ground that the extensions were not required in the interest of public convenience and necessity (R. 432; 138 I. C. C. 363). Petitioner, on May 22, 1928, brought suit in the United States District Court, for the Western District of South Carolina, against the United States, under the Urgent Deficiencies Act (28 U. S. C. A., Sec. 47), to set aside and annul that part of the order of the Commission which denied petitioner's claim of exemption as an interurban electric railway. The District Court of three Judges dismissed the suit on its merits (30 F. (2d), 421), and, upon the appeal of petitioner, this Court held that the order of the Commission, being negative in substance as well as in form, infringed no right of petitioner, and therefore did not come within the scope of the remedy afforded by the Urgent Deficiencies Act, and that the District Court should have dismissed the suit for want of jurisdiction. Accordingly the decree of the District Court dismissing the suit on its merits was reversed, with direction to dismiss for want of jurisdiction (280 U. S. 469).

6. On March 10, 1930, petitioner began the construction of the extension from Spartanburg, South Carolina, to Gastonia, North Carolina, which would connect its two existing lines, and was at work on this extension when this suit was instituted (R. 3). The original complaint sought an injunction only in respect of this extension (R. 4), but the amended complaint and the bill of intervention of the intervening plaintiffs sought

an injunction also in respect of the other extension originally proposed from Charlotte to Winston-Salem, and the final decree is in conformity with the prayer of the amended complaint and the prayer of the bill of intervention (R. 487).

7. The District Court, relying on the opinion of this Court in *Texas & Pacific Railway Co.* v. *Gulf, Colorado & Santa Fe Railway Co.*, 270 U. S. 266, which interpreted that part of Paragraph (22) which exempts, from the Commission's authority over the construction and abandonment of railroad mileage, spur and certain other tracks "located or to be located wholly within one State" (R. 451), held that, although the quoted phrase does not limit the exemption of interurban electric railways, it was not the intention of Congress by Paragraph (22) to deprive "the Interstate Commerce Commission of jurisdiction and its control for abandonment and construction purposes over any important interstate carrier whose general transportation of interstate freight was so large as to make it a carrier of national importance (R. 454, 455). The Court said:

> "* * * The question as we see it, is not reducible to the single inquiry as to whether or not the Piedmont and Northern is an 'interurban railway'. We think a more accurate statement of the question is whether the Piedmont and Northern, although literally an interurban electric railway, not operated as part of a general steam railroad system, possesses so many of the characteristics and functions of a great

interstate carrier as to negative any conclusion that Congress ever intended to exempt a railroad of its type and magnitude from regulation by the Interstate Commerce Commission with respect to control over abandonments and extensions. However, we reason about the words 'interurban' and 'electric', the Piedmont and Northern comes within the *prima facie* meaning of each of these words. It has been so denominated both as a matter of common designation by the public and of classification in railroad circles. It was and has been referred to as 'interurban' by Court and Commission, State and Federal. Even the Interstate Commerce Commission, itself, has for many purposes classified it as an interurban railway, and on the trial of this case documents were introduced wherein the Commission had, in referring to the Piedmont and Northern, referred to it as an interurban railway. It is not, as we see it, a contest to be waged over the word 'interurban' and its meaning, but it is a decision of the question of whether or not paragraph 22, when construed in the light of the whole Transportation Act, can be said to include within its terms, the Piedmont and Northern Railroad, when due regard is given to its history, its physical characteristics, its methods of operation, the character of traffic handled, and its importance as an interstate carrier viewed from a national standpoint.

"We feel that the case which gives us the most help, and the one which really has caused this court to come to the conclusion announced, is a case which construes the other clause in the particular amendment which we are here called upon to construe" (R. 450, 451).

*Texas & Pacific Railway Co.* v. *Gulf, Colorado & Santa Fe Railway Co.* was the case referred to, and the Court quoted from it at length. It concluded that petitioner's claim of exemption as an interurban electric railway could not succeed chiefly because "the Piedmont and Northern as it now exists is a railroad of such importance from a national standpoint as to negative any idea that its proposed extensions are matters of purely local interest" (R. 455), and because the Court was of the opinion "that the Piedmont and Northern is now an important factor in through freight transportation, and that with the proposed extensions it would become such an important line of railway as to injure seriously the three great trunk lines now serving the Atlantic Seaboard in the handling of north and south traffic" (R. 456).

B.

**Reasons Relied on for the Allowance of the Writ.**

1. The scope of the term, "interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation," as used in the Interstate Commerce Act, as amended by Transportation Act, 1920, is an important question of Federal law which has not been, but should be settled by this Court; for the reason that such railways, even though engaged in interstate commerce and in other respects subject to the Interstate Commerce Act as so amended, are exempt from the jurisdiction of the Interstate Commerce Commission over the construction, extension and abandonment of lines and the issuance

of securities; in cases where the exemption does not apply the jurisdiction of the Interstate Commerce Commission is exclusive of the jurisdiction of the State authorities; in cases where the exemption does apply the State authorities have exclusive jurisdiction; it is therefore important that the question of jurisdiction, as between the Commission and the State authorities, be settled by this Court.

2. The District Court in interpreting the term, "interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation," gave no consideration to the context of those provisions of the Interstate Commerce Act, as amended by Transportation Act, 1920, in which the term appears.

3. The decision of the District Court confining the meaning of the term, "interurban electric railways", to that class of electric carriers whose operations are of purely local interest, as distinguished from carriers of national importance, is probably in conflict with the decisions of this Court in *Omaha & C. B. Street R. Co.* v. *Interstate Commerce Commission*, 230 U. S. 324, and *United States* v. *Village of Hubbard*, 266 U. S. 474, dealing with the jurisdiction of the Interstate Commerce Commission over electric carriers engaged in interstate commerce.

4. The District Court, in treating the opinion of this Court in the case of *Texas & P. R. Co.* v. *Gulf & S. F. R. Co.*, 270 U. S. 266, as controlling the decision in this case, carried the doctrine of that opinion too far.

WHEREFORE it is respectfully submitted that this petition should be granted.

This 28th day of January, A. D. 1932.

PIEDMONT AND NORTHERN
RAILWAY COMPANY,
By H. J. HAYNSWORTH,
R. S. HUTCHISON,
W. S. O'B. ROBINSON, JR.,
*Counsel for Petitioner.*

# BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

## The Opinion Below.

The opinion of the U. S. District Court, for the Western District of South Carolina, was written by Judge J. Lyles Glenn, and was filed May 23, 1931. It appears on page 435 of the record, and is reported in 51 F. (2d), 766.

## Jurisdiction.

(*a*) The jurisdiction of this Court is invoked under Sec. 240 (*a*) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938, 28 U. S. C. A., Sec. 347 (*a*); and as to the timeliness of its application for a writ of certiorari petitioner relies on the second paragraph of Sec. 8 of the Act of February 13, 1925, c. 229, Sec. 8, 43 Stat. 940, 28 U. S. C. A., Sec. 350.

(*b*) The final decree of the U. S. District Court, sought to be reviewed, is dated June 9, 1931 (R. 487). Petitioner's appeal from the final decree was filed August 8, 1931, and was allowed August 9, 1931 (R. 511). The transcript of the record was filed and the appeal docketed in the U. S. Circuit Court of Appeals, Fourth Circuit, November 23, 1931, pursuant to the order of the District Court extending the time for docketing the appeal (R. 510). The cause has not been heard in the Circuit Court of Appeals, and has been

continued by that Court until its April Term, 1932 (R. 515).

(*c*) The suit was brought, and the jurisdiction of the District Court was invoked, under Paragraph (20) of Sec. I of the Interstate Commerce Act, as amended by Transportation Act, 1920, 49 U. S. C. A., Sec. 1 (20), and under Sec. 24, Paragraph 8, of the Judicial Code, 28 U. S. C. A., Sec. 41, subd. (8) (R. 2). It was brought by the Interstate Commerce Commission, the Southern Railway Company and other steam railroads intervening as plaintiffs, to enjoin petitioner from constructing extensions of its lines of electric railway without first obtaining from the Interstate Commerce Commission a certificate of public convenience and necessity under Paragraph (18), Sec. I, of the Act. The District Court ruled that petitioner is subject to the provisions of Paragraph (18), and therefore must obtain the certificate required by that paragraph before undertaking the construction of the extensions, and accordingly entered a final decree in conformity with the prayer of the complaint permanently enjoining petitioner from constructing the proposed extensions unless and until it first obtains from the Commission a certificate of public convenience and necessity (R. 487).

(*d*) The cases relied on to sustain the jurisdiction of this Court are as follows:

*Texas & New Orleans R. R. Co.* v. *Northside Belt Ry. Co.*, 276 U. S. 475;

*Western Pacific California Railroad Co.* v. *Southern Pacific Co.*, No. 51, October Term, 1931. Decided November 23, 1931.

## Statement of Case.

The case is sufficiently stated in the accompanying petition for writ of certiorari.

## Specification of Assigned Errors Intended to be Urged.

The principal question raised by the assignments of error is whether the District Court erred in holding that the railway of petitioner is not an interurban electric railway, which is not operated as a part of a general steam railroad system of transportation, within the scope of the exemption given such interurban electric railways by Paragraph 22 of Section 1 of the Interstate Commerce Act, as amended by Transportation Act, 1920, 49 U. S. C. A., Sec. 1 (22).

Error is also assigned to the facts found by the District Court and to the exclusion of evidence relating to the interurban character of petitioner's railway, but these assignments of error raise no separate questions and are merely incidental to the principal question presented.

## Statutes.

Transportation Act, 1920, Sec. 402 (49 U. S. C. A., Sec. 1), provides:

> Paragraph "(18) * * * no carrier by railroad subject to this Act shall undertake the extension of its line of railroad * * * unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity

require or will require the construction * * * of such * * * extended line * * *" Paragraph "(20) * * * Any construction contrary to the provisions * * * of Paragraph (18) may be enjoined by any court of competent jurisdiction at the suit of * * * the Commission * * * or any party in interest * * *" Paragraph "(22) The authority of the Commission conferred by Paragraphs (18) to (22), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one state, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

Section 439 of the Transportation Act of 1920 (49 U. S. C. A., Sec. 20*a*), which inserts in the Interstate Commerce Act the new Section 20*a*, concerning the issue of securities, by Paragraph 1 excludes from the scope of that section "a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation."

Section 422 of the Transportation Act of 1920 (49 U. S. C. A., Sec. 15*a*), which inserts in the Interstate Commerce Act the new Section 15*a* dealing with the determination of a fair return, by Paragraph 1 excludes "(*b*) street or suburban electric railways unless operated as a part of a general steam railroad system of transportation, (*c*) interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight."

Section 204 of the Transportation Act of 1920 (49 U. S. C. A., Sec. 73), concerning the reimbursement of deficits during Federal Control excludes by Paragraph (*a*) "any street or interurban electric railway which has as its principal source of operating revenue urban, suburban or interurban passenger traffic or sale of power, heat, and light, or both * * *."

Section 209 of the Transportation Act of 1920 (49 U. S. C. A., Sec. 77), concerning the guaranty to carriers after the termination of Federal Control excludes by Paragraph (*a*) "a street or interurban electric railway not under Federal Control at the time Federal Control terminates, which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both."

## ARGUMENT.

### I.

**The scope of the term, "Interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transporation," as used in the Interstate Commerce Act, as amended by Transportation Act 1920, is an important question of Federal law, which has not been, but should be, settled by this Court.**

The jurisdiction of the Interstate Commerce Commission, where it exists in respect of the construction, extension or abandonment of lines and the issuance of securities by carriers, is exclusive of the jurisdiction of the State authorities. Paragraph 20 of Section 1

provides that from and after the issuance of a certificate of public convenience and necessity for the construction, extension or abandonment of lines, "the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation or abandonment covered thereby." Paragraph 7 of Section 20*a* provides that the jurisdiction conferred upon the Commission over the issuance of securities by carriers "shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein."

"Street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation" by Paragraph 22 of Section 1 are exempt from the jurisdiction of the Commission over the construction, extension or abandonment of lines, and in Paragraph 1 of Section 20*a* substantially the same language is used in exempting such railways from the jurisdiction of the Commission over the issuance of securities by railroads.

If the exemption applies, then the carrier, even though engaged in interstate commerce and in other respects subject to the jurisdiction of the Commission, is in respect of the construction, extension and abandonment of lines and the issuance of securities subject to the exclusive jurisdiction of the State au-

thorities. *Western & Atlantic R. Co.* v. *Georgia Public Service Commission*, 267 U. S. 493.

Paragraph 20 of Section 1 provides that, "Any carrier which, or any director, * * * or person, acting for or employed by such carrier, who knowingly authorized, consents to, or permits any violation of the provisions of this paragraph or of Paragraph (18) of this section, shall upon conviction thereof be punished by fine of not more than $5,000 or by imprisonment for not more than 3 years, or both." Paragraph 11 of Section 20*a* imposes even more severe penalties and liabilities on "any director, officer, attorney or agent of the carrier who knowingly assents to or concurs in any issue of securities or assumptions of obligation or liability forbidden by this section, or any sale or other disposition of securities contrary to the provisions of the Commission's order or orders in the premises, or any application not authorized by the Commission of the funds derived by the carrier through such sale or other disposition of such securities." Like penalties are usually imposed by State laws for the violation of their provisions.

If an electric carrier is subject to the Interstate Commerce Act and not within the exemption in question, a failure to comply with the provisions of the Act in respect of the construction, extension and abandonment of lines and the issuance of securities subjects it and its officers, directors and agents who knowingly consent to or concur in the prohibited act to the penalties imposed by the Federal statute; while if such carrier is within the exemption and therefore subject

to the jurisdiction of the State authorities a failure to comply with the applicable State laws subjects the carrier, and its responsible officer, directors and agents, to the penalties imposed by such laws.

Manifestly it is important that the question of jurisdiction, as between the Commission and the State authorities, be definitely settled by this Court. The decision of the District Court affords no definite standard as to what constitutes an "interurban electric railway which is not operated as a part of a general steam railroad system of transportation", within the meaning of that term as used in the Interstate Commerce Act. According to the opinion of the District Court the purpose of the exemption given by the term in question "was to deal with local situations, and it in no way evidences a serious intention of depriving the Interstate Commerce Commission of jurisdiction and its control for abandonment and construction purposes over any important interstate carrier whose general transportation of interstate freight was so large as to make it a carrier of national importance", and the exemption applies to electric carriers only when their "proposed extensions are matters of purely local interest." The opinion indicates no test by which to determine whether an electric railway is "a carrier of national importance" or one "of purely local interest"; or by which to determine to what extent it may engage in the "general transportation of interstate freight" without losing exemption as an interurban electric railway.

The fact that an electric railway is engaged in the general transportation of interstate freight, that it

draws from this source the major part of its operating revenues, and that it participates with steam railroads in through freight routes and joint rates does not debar it from classification as an interurban electric railway within the scope of that term as used in the Act. *United States* v. *Village of Hubbard*, 266 U. S. 474. Carriers whose operations "are matters of purely local interest", if by that expression is meant carriers engaged exclusively in intrastate commerce, are clearly not within Federal jurisdiction. *Texas & N. O. R. Co.* v. *Northside Belt R. Co.*, 276 U. S. 475.

II.

**The District Court in interpreting the term, "Interurban electric railways which is not operated as a part or parts of a general steam railroad system of transportation," gave no consideration to the context of those provisions of the Interstate Commerce Act, as amended by Transportation Act, 1920, in which the term appears.**

No consideration was given to the difference between the exception in Section 15*a* of the Act and the exception in Paragraph 22 of Section 1 and in Paragraph 1 of Section 20*a*. Section 15*a* excludes from the scope of its provisions "interurban electric railways unless operated as a part of a general steam railroad system of transportation *or engaged in the general transportation of freight.*" Paragraph 22 of Section 1 excludes from the scope of the provisions of Paragraphs 18 to 21 "interurban electric railways, which are not operated as a part or parts of a gen-

eral steam railroad system of transportation", and the exception in Paragraph 1 of Section 20*a* is in substantially the same language. Interurban electric railways are excluded from the scope of the provisions of Section 15*a* subject to two exceptions; they are excluded from the scope of the provisions of Paragraph 18 of Section 1 and of Section 20*a* subject to only one exception. If Congress had intended to except interurban electric railways engaged in the general transportation of freight from the exemption given interurban electric railways by Paragraph 22, it would have used the same language in that paragraph which it used in Section 15*a*. The one exception in Paragraph 22 should not be given the same effect as the two exceptions in Section 15*a*. The acceptance of the argument that an electric railway forfeits the right to classification as an interurban by engaging in the general transportation of freight would render meaningless the language of Section 15*a* excepting from exclusion from the scope of the provisions of that section "interurban electric railways * * * engaged in the general transportation of freight."

The Transportation Act of 1920, Section 204 (49 U. S. C. A., Sec. 73), gives recognition to the fact that an interurban electric railway may draw the major part of its operating revenues from freight traffic; and Section 209 (49 U. S. C. A., Sec. 77), not only to this fact but also to the fact that interurban electric railways were taken under Federal Control under the provisions of the Federal Control Act of March 21, 1918, 40 Stat. L. 451.

III.

**The decision of the District Court confining the meaning of the term "Interurban electric railways" to that class of electric carriers whose operations are of purely local interest, as distinguished from carriers of national importance, is probably in conflict with the decisions of this Court in Omaha & C. B. Street R. Co. vs. Interstate Commerce Commission, 230 U. S. 324, and United States vs. Village of Hubbard, 266 U. S. 474, dealing with the jurisdiction of the Interstate Commerce Commission over electric carriers engaged in interstate commerce.**

The Omaha case involved the question as to whether an interstate street railway operating between Omaha, Nebraska, and Council Bluffs, Iowa, was a carrier within the purview of the Act to Regulate Commerce, so as to warrant the Interstate Commerce Commission in assuming jurisdiction over its passenger fares. The Court held that it was not within the purview of the Act for the reason that—

> "The railroads referred to in the Act were not those having separate, distinct, and local street lines, but those of whom it was required that they should make joint rates and reasonable facilities for interchange of traffic with connecting lines, so that freight might be easily and expeditiously moved in interstate commerce."

The Court further said:

> "But it is said that since 1887, when the Act was passed, a new type of interurban road has

been developed which, with electricity as a motive power, uses larger cars, and runs through the country from town to town, enabling the carrier to haul passengers, freight, express, and the mails, for long distances at high speed. We are not dealing with such a case, but with a company chartered as a street railroad, doing a street railway business, and hauling no freight."

In the *Village of Hubbard case* the Court said:

"The development of interurban roads became general about 1902. The authority to regulate them has been consistently exercised by the Commission in many cases and for many purposes. Since 1915, interurban electric roads have been required to file with it annual reports of their finances and operations. *Jurisdiction over Urban Electric Lines,* 33 Inters. Com. Rep. 536. In exercising authority over their passenger fares, no distinction has been made between those interurban roads which were engaged in the general transportation of freight in addition to their passenger and express business and those which were not. On the other hand, the distinction suggested in *Omaha & C. B. Street R. Co.* v. *Interstate Commerce Commission,* 230 U. S. 324, 337, 57 L. Ed. 1501, 1506, 46 L. R. A. (N. S.) 385, 33 Sup. Ct. Rep. 890, between interurban railroads and urban or suburban street railways, has been carefully observed.

"* * * The correctness of the Commission's action in assuming jurisdiction over the interurban roads is confirmed by the action of

> Congress, which, in recent amendments of the Act to Regulate Commerce, limited, in respect to certain subjects, the authority over them. The Commission entertained, in 1908, applications of interurban electric railroads to establish for freight through routes and joint rates with steam railroads. The Act of June 18, 1910, chap. 309, 36 Stat. at L. 539, 551, 552, Comp. Stat. Sec. 8583, 4 Fed. Stat. Anno. 2d ed., p. 469, provided that 'the Commission shall not, however, establish any through route, classification, or rate between street electric passenger railways not engaged in * * * transporting freight in addition to their passenger and express business and railroads of a different character.' Transportation Act, February 28, 1920, chap. 91, 41 Stat. at L. 456, Comp. Stat. Sec. 10,071¼, Fed. Stat. Anno. Supp. 1920, p. 72, enlarged, in several respects, the powers of the Commission, and dealt also in other ways with carrier engaged in interstate commerce. In doing so, it provided expressly, in five sections, for the exclusion of certain electric railways from the operation of the powers conferred; and it also differentiated interurban electric railways from street and suburban railways by specific reference to each, although a distinction in treatment was made in only one case."

An electric railway engaged exclusively in intrastate commerce is not within the purview of the Interstate Commerce Act, and therefore does not need express exclusion from any of its provisions. It comes within the purview of the Act only when, by undertaking to

engage in interstate commerce, it becomes a carrier of national importance; and the same facts which make it subject to the provisions of the Act cannot be given the effect of depriving it of exemption, where exemption is expressly given, as in the case of interurban electric railways, not operated as a part of a general steam railroad system of transportation.

In *Texas & N. O. R. Co.* v. *Northside Belt R. Co.*, 276 U. S. 475, 479, the Court said:

> "The mere fact that a railroad lies wholly within one state, and is to be built by an independent corporation, does not, of course, prevent the application of Paragraphs 18 to 22. If it undertakes to engage in interstate commerce, its operation becomes immediately a matter of national concern and it comes within the purview of those paragraphs. But Congress did not in terms prohibit wholly intrastate carriers from building lines to be used wholly in intrastate commerce. As long as the North-state Company confines its operations to intrastate commerce, it will not violate the federal law."

IV.

**The District Court in treating the opinion of this Court in the case of Texas & P. R. Co. vs Gulf & S. F. R. Co., 270 U. S. 266, as controlling the decision in this case, carried the doctrine of that opinion too far.**

In denying petitioner the exemption which it claims under Paragraph 22, the District Court said:

> "We feel that we have followed the guide as laid down for us by the United States Supreme

Court in the case of *Texas & Pacific Railway Co.* v. *Gulf, Colorado & Santa Fe Railway Co.*, 270 U. S. 266" (R. 457).

In the *Texas & Pacific case* the Court pronounced on that part of Paragraph 22 which exempts from the scope of the provisions in Paragraph 18 the construction of industrial and certain other tracks "located wholly within one state".

The question was whether the extension proposed by the Gulf, Colorado & Santa Fe Railway Company was within the language of the exemption excluding spur, industrial, team, switching or side tracks located wholly within one state. In deciding this question the Court referred to the fact that the statute was intended to prevent waste involved in new railway construction, and to the fact that the proposed extension would go into new territory serving several industries and would divert from other railways freight of very considerable importance. The Court said, when read in the light of the Congressional policy, the meaning and scope of the terms "extensions" and "industrial tracks" became clear, and held that the proposed new track would be an "extension" and not an "industrial track" within the meaning of the statute. But manifestly the language of the Court in differentiating between an extension on the one hand and an industrial or side track on the other, will not control in determining the meaning of the provision excluding interurban electric railways not operated as a part or parts of a general steam railroad system of transportation.

The Court said:

> "Tracks of that character are commonly constructed either to improve the facilities required by shippers already served by the carrier, to supply the facilities to others, who being within the same territory and similarly situated are entitled to like service from the carrier. The question whether the construction should be allowed or compelled depends largely upon local conditions which the state regulating body is peculiarly fitted to appreciate. Moreover, the expenditure involved is ordinarily small. But where the proposed trackage extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of a national concern."

The restriction, "located or to be located wholly within one state", is not attached to the exemption of interurban electric railways. The only restriction on the exemption of such railways is contained in the language excluding from exemption those, "which are operated as a part or parts of a general steam railroad system of transportation". The exemption extends not only to the extensions of an existing interurban electric railway, but to the new construction of such a railway in its entirety. It may be constructed across state lines so as to be interstate in respect of any physical location as well as in respect of the traffic to be handled.

In the case of such a railway it cannot be said that "the question whether the construction should be allowed or compelled depends largely upon local condi-

tions which the state regulating body is peculiarly fitted to appreciate". If it is constructed for the purpose of engaging in interstate commerce so as to come within the purview of the provisions of the Interstate Commerce Act it cannot be denied that it is "of national concern", because by undertaking to engage in interstate commerce it immediately becomes a carrier of national concern.

It would hardly be possible—certainly not practicable, to construct an interurban electric railway of sufficient importance to bring it within the purview of the Interstate Commerce Act without extending into territory already served by other carriers and competing with them.

The doctrine of the opinion in the *Texas and Pacific case* is applicable only in determining whether the construction of new mileage by a carrier, not wholly exempt from the provisions of Paragraph 18, comes within the class of the specially exempted tracks, designated in Paragraph 22, or within the class of those not exempted. It is not applicable to a carrier, all of whose tracks are exempt.

The District Court, treating as controlling the opinion of this Court in the *Texas and Pacific case*, enjoined the construction of the proposed extensions because the Court found that they would serve territory already served by other carriers and would injure these other carriers by diverting from them a substantial amount of traffic (R. 455, 456).

And evidently because it considered that opinion controlling, the Court gave no consideration, either in its

opinion or in its findings of fact, to the fact that petitioner's railway has been constructed and equipped and is maintained and operated as an interurban electric railway, as distinguished from a street or suburban electric railway on the one hand, and from electrified sections of steam railroads on the other hand (R. 127, 128, 129, 132, 139, 143, 163, 169, 170, 296, 310-319, 344-349, 368-377, 387, 388).

The Court gave no consideration to the fact that petitioner's railway belongs to that class of electric railways which are now, and were at and prior to the time of the passage of the Transportation Act of 1920, commonly known and described as interurban electric railways (R. 300, 305-310, 371, 378; Special Reports of the Census Office, Street and Electric Railways, 1902, pp. 3, 105, and 214; Special Reports of The Bureau of the Census, Street and Electric Railways, 1907, pp. 93, 265, and 272; Census Report, Electric Railways 1917, p. 107; *Chicago & M. Electric R. Co.* v. *Illinois C. R. Co.*, 13 I. C. R. 20; *Cedar Rapids & I. C. R. & Light Co.* v. *Chicago & N. W. R. Co.*, 13 I. C. R., 250; *U. S.* v. *Village of Hubbard*, 266 U. S. 474, and footnotes).

Nor did the Court give consideration to the fact that until the Commission's ruling of April 3, 1928, in *Proposed Construction of Lines by Piedmont and Northern Railway Company*, 138 I. C. C., 363, petitioner's railway had been treated by the Commission and other Federal authorities as an interurban electric railway (R. 173, 362-365, 450, 451; Decision No. 33, U. S. Railroad Labor Board, Docket 26-*a*, December 11, 1920).

## Conclusion.

It is, therefore, respectfully submitted that the accompanying petition for a writ of certiorari to the United States Circuit Court of Appeals, for the Fourth Circuit, should be granted.

H. J. HAYNSWORTH,
R. S. HUTCHISON,
W. S. O'B. ROBINSON, JR.,
*Counsel for Petitioner.*

CHARLOTTE, N. C., *January* 28, 1932.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1931

NO. 664

PIEDMONT AND NORTHERN RAILWAY COMPANY, PETITIONER,

*v.*

INTERSTATE COMMERCE COMMISSION, SOUTHERN RAILWAY COMPANY, CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY, ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, CAROLINA, CLINCHFIELD & OHIO RAILWAY, CAROLINA, CLINCHFIELD & OHIO RAILWAY OF SOUTH CAROLINA, AND CLINCHFIELD NORTHERN RAILWAY OF KENTUCKY, RESPONDENTS.

## SUPPLEMENTAL BRIEF FOR PIEDMONT AND NORTHERN RAILWAY COMPANY, PETITIONER.

H. J. HAYNSWORTH,
R. S. HUTCHISON,
W. S. O'B. ROBINSON, JR.,
*Counsel for Petitioner.*

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## SUPPLEMENTAL BRIEF FOR PIEDMONT AND NORTHERN RAILWAY COMPANY, PETITIONER.

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### Statement of Case.

To the statement of the case contained in the petition for a writ of certiorari (pp. 2-9), petitioner desires to add the following statement of the facts on which it relies in support of the contention that its railway is "an interurban electric railway, which is not operated as a part or parts of a general steam railroad system of transportation":

Until the Commission's ruling of April 3, 1928, in *Proposed Construction of Lines by Piedmont and Northern Railway Company*, 138 I. C. C. 363, petitioner's railway had been officially treated and dealt with by the Interstate Commerce Commission, the U. S. Railroad Administration, the U. S. Labor Board and other federal authorities as an interurban electric railway. (R. 173, 362-365, 450, 451). It has made reports of its operations and finances to the Interstate Commerce Commission under the accounting rules governing electric railways. (R. 365). It was taken over by the government under the proviso contained in the seventh paragraph of Section I of the Federal Control Act of March 21, 1918, (40 Stat. L. 451), including within "Federal Control" interurban electric railways whose principal source of operating revenue was freight traffic (U. S. House Hearings, 66th Congress, First Session, Vol. 15, p. 2796). The Commission on October 12, 1920, ruled informally that it was an interurban electric railway not operated as a part of a general steam railroad system of transportation, and that it was therefore within the exemption contained in Section 20a exempting such railways from the authority of the Commission over the issuance of carrier securities. (R. 362). On December 11, 1920, the U. S. Railroad Labor Board ruled in Decision No. 33, Docket 26-a, that for the same reason it was not subject to the jurisdiction of the Labor Board. (R. 173). It is paid by the Post Office Department for transporting United States mail as an interurban electric railway, in accordance with the order of the Interstate Commerce Commission of August 7th, 1920, in Electric Railway Mail Pay, 58 I. C. C., 455. (R. 361).

Its lines connect and tie in with the street railway systems in the cities and towns through which it operates.

(R. 380). Of its main line mileage 15.13 miles is operated jointly with street car lines. (R. 184). The first properties acquired were the street railway properties in Anderson, Greenville and Charlotte, which were acquired in order that the lines to be built between the cities might be tied in with the street railway systems, thus affording these lines access to and terminals in the principal cities en route and assuring the interurban lines of trackage rights over the street railway systems. (R. 380).

On March 10, 1910, the Greenville, Spartanburg and Anderson Railway Company was incorporated under the general laws of the State of South Carolina. (R. 143). It purchased the existing interurban electric railway between Belton and Anderson, South Carolina, a distance of about 10½ miles, and constructed the line in South Carolina from Greenwood to Spartanburg. (R. 382).

On January 6, 1910, the Piedmont Traction Company was incorporated under the laws of the State of North Carolina as a street railway company, and constructed the line in North Carolina between Gastonia and Charlotte, and also the street railway system in Gastonia. (R. 143, 382).

The Piedmont and Northern Railway Company was incorporated by Special Act of the Legislature approved February 24, 1911, (R. 156), and thereafter the properties formerly owned and operated by the Piedmont Traction Company and the Greenville, Spartanburg and Anderson Railway Company were conveyed to it. These properties included the line from Charlotte to Gastonia, the street railway system in Gastonia, trackage rights over the street railway system in Charlotte, the lines in South Carolina from Greenwood to Spartanburg, and

from Anderson to Belton, and trackage rights over the street railway systems in Anderson and Greenville. (R. 382.)

Petitioner's railway is, and has always been, operated exclusively by electricity as a motive power, (R. 386); and it is not, and has never been, operated as a part of any steam railroad system of transportation. (R. 387).

The voltage used in the operation of petitioner's railway is 1500 direct current supplied through an overhead trolley supported by poles, (R. 310, 387), as compared with 3000 volts direct current or 11,000 alternating current ordinarily used on electrified sections of steam railroads. (R. 347). The volume and character of voltage required on an electric railroad is determined by the character of service to be performed and the volume of traffic to be moved; where traffic is moved in small units and at frequent intervals the lower voltag of 1500 D. C. is suitable and feasible; but where traffic is heavy, moving less frequently and in heavier train loads the higher voltage of 3000 D. C. or 11,000 A. C. is required. (R. 347).

The overhead construction and power supply of petitioner's railway is similar to that which was used on many of the early electric railways constructed about 1902, (R. 310, 311); and differs radically from the overhead construction in use on electrified sections of steam railroads. (R. 312, 348).

The substation capacity on petitioner's railway is approximately 75 Kilowatts per mile, whereas in steam railroad electrification it is never lower than 150 and runs as high as 1000 Kilowatts per mile. (R. 319). The substation capacity is low not only in respect of individual units, but also in respect of the total capacity of the en-

tire road. For example, the total capacity of petitioner's railway consisting of 129 miles is 10,600 Kilowatts, as compared with 36,000 Kilowatts on the electrified section of the Delaware and Lackawanna, consisting of 160 miles. (R. 370).

If petitioner were to change its railway and equipment so as to be able to haul larger trains and use larger locomotives, (such as those used on electrified sections of steam railroads), the whole road would have to be revised, the existing substations abandoned and others built in their place. (R. 370).

Petitioner's signal system is a selective control block system which would not be suitable for use on a main line steam railroad. (R. 311, 376).

Petitioner's locomotives vary in weight from 50 to 100 tons, (R. 316), and are decidedly lighter and smaller than those in use on electrified divisions of steam railroads, (R. 344, 345), and would not be suitable or feasible for use on an electrified division of a steam railroad. (R. 345, 370). All the locomotives are designed so that they can be used on every mile of petitioner's railway, and in this respect also they differ from the practice on electrified divisions of steam railroads where several classes of locomotives are used for different purposes, such as one type for switching operations and another for main line operations. (R. 370). Petitioner's locomotives are the type commonly known as interurban locomotives; they are constructed on swivel type trucks, whereas locomotives on electrified sections of steam railroads have a rigid wheel base. (R. 316, 317).

The passenger cars are motivated by self-contained motor units instead of being drawn by locomotives; they

are lighted in series from the trolley, are equipped with radial drawbars enabling them to make sharp turns; all but six of the twenty-two passenger cars are equipped with double-end control so that they may be operated from either end; and all of them are equipped with multiple unit control so that if two of them are coupled together they may be operated by one motorman. (R. 315). Its passenger cars make frequent stops, averaging 1.2 miles apart. (R. 169). Its freight trains are operated in small units and at frequent intervals; they set out and pick up freight all along the line; and use the street railway lines to pick up and deliver freight within the cities. (R. 172, 179, 373, 374, 375).

## Question Presented.

The question presented is whether or not petitioner's railway is "an interurban electric railway, which is not operated as a part or parts of a general steam railroad system of transportation," within the meaning of the language of Section I, Paragraph 22, of the Interstate Commerce Act, as amended by Transportation Act, 1920, (49 U. S. C. A., Sec. I(22)), excluding such railways from the scope of the provisions of Paragraph 18 which prohibits any carrier by railroad subject to the Act from undertaking any extension of its lines or construction of new lines, without first obtaining from the Interstate Commerce Commission a certificate of public convenience and necessity.

This question is raised by Assignments of Error VI to XXI, (R. 496-502), and by the petition for the writ of certiorari.

## ARGUMENT.

### V.

**The language of Paragraph 22 of Section I of the Interstate Commerce Act, as amended by Transportation Act, 1920, exempting "interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation" from the scope of the provisions of Paragraph 18, being plain and unambiguous, especially when read in connection with the other provisions of the Act dealing with electric railways, leaves no room for a construction rejecting the literal meaning of its terms.**

Paragraph 22 makes the test of Federal jurisdiction over the construction and abandonment of lines by interurban electric railways depend solely on whether or not such railways are operated as a part or parts of a general steam railroad system of transportation. If they are so operated the Interstate Commerce Commission has jurisdiction. If they are not so operated jurisdiction is left with the state authorities.

The language of the statute is plain and unambiguous and leaves no room for a construction which would make the jurisdiction of the Commission over the construction of electric railways depend upon the effect which the construction would have in diverting interstate traffic from other carriers by railroad, who are subject to the Act.

In *Crooks v. Harrelson*, 282 U. S. 55, 75 L. ed. 156, the court in disposing of a contention that the literal meaning of a section of the Revenue Act of 1918 should be rejected because it would lead to absurd results, said:

"It is urged, however, that if the literal meaning of the statute be as indicated above, that meaning should be rejected as leading to absurd results, and a construction adopted in harmony with what is thought to be the spirit and purpose of the act in order to give effect to the intent of Congress. The principle sought to be applied is that followed by this Court in *Church of the Holy Trinity* v. *United States*, 143 U. S. 457, 36 L. ed. 226, 12 S. Ct. 511; but a consideration of what is there said will disclose that the principle is to be applied to override the literal terms of a statute only under rare and exceptional circumstances. The illustrative cases cited in the opinion demonstrate that to justify a departure from the letter of the law upon that ground, the absurdity must be so gross as to shock the general moral or common sense. Compare *Pirie* v. *Chicago, Title & T. Co.*, 182 U. S. 438, 451, 452, 45 L. ed. 1171, 1178, 1179, 21 S. Ct. 906. And there must be something to make plain the intent of Congress that the letter of the statute is not to prevail. *Treat* v. *White*, 181 U. S. 264, 268, 45 L. ed. 853, 854; 21 S. Ct. 611."

"Courts have sometimes exercised a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear in order to escape consequences thought to be absurd or to entail great hardship. But an application of the principle so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usur-

pation of the latter. *Monson* v. *Chester*, 22 Pick. 385, 387. It is not enough merely that hard and objectionable or absurd consequences, which probably were not within the contemplation of the framers, are produced by an act of legislation. Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts. See *Re Alma Spinning Co.* L. R. 16 Ch. Div. 681, 686; 7 Eng. Rul. Cas. 589; *Rex* v. *Commissioners of Navigation*, 5 Ad. & El. 804, 816; 111 Eng. Reprint, 1370; *Abley* v. *Dale* (1851) 20 L. J. C. P. N. S. 33, 35. And see generally *Chung Fook* v. *White*, 264 U. S. 443, 445, 68 L. ed. 781, 782, 44 S. Ct. 361; *Commissioner of Immigration* v. *Gottlieb*, 265 U. S. 310, 313, 68 L. ed. 1031, 1033; 44 S. Ct. 528.".

In *United States* v. *Missouri P. R. Co.*, 278 U. S. 269, 73 L. ed. 322, in interpreting Paragraph 4 of Section 15 of the Interstate Commerce Act, as amended by the Transportation Act of 1920, the court, in an opinion by Mr. Justice Butler, said:

"The language of that provision is so clear and its meaning so plain that no difficulty attends its construction in this case. Adherence to its terms leads to nothing impossible or plainly unreasonable. We are therefore bound by the words employed and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. It is elementary that where no ambiguity exists there is no room for construc-

tion. Inconvenience or hardships, if any, that result from following the statute as written, must be relieved by legislation. It is for Congress to determine whether the Commission should have more authority in respect of the establishment of through routes. Construction may not be substituted for legislation. *United States* v. *Wiltberger*, 5 Wheat. 76, 95, 5 L. ed. 37, 42; *United States* v. *Fisher*, 2 Cranch, 358, 386, 2 L. ed. 304, 313; *Lake County* v. *Rollins*, 130 U. S. 662, 670, 32 L. ed. 1060, 1063, 9 Sup. Ct. Rep. 651, *Caminetti* v. *United States*, 242 U. S. 470, 61 L. ed. 442, L. R. A. 1917F, 502, 37 Sup. Ct. Rep. 192, Ann. Cas. 1917B, 1168; *Ex parte Public Nat. Bank*, 278 U. S. 101, ante, 202, 49 Sup. Ct. Rep. 43; *United States* v. *Colorado & N. W. R. Co.*, 15 L. R. A. (N. S.) 167, 85 C. C. A. 27; 157 Fed. 321; 13 Ann. Cas. '893."

In *Sturges* v. *Crowninshield*, 4 Wheat. 122, 202, Chief Justice Marshall said:

"It would be dangerous in the extreme to infer that from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation. Where words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. But if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not

intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application."

In *Pirie* v. *Chicago Title & Trust Co.*, 182 U. S. 438, 451, Mr. Justice McKenna said:

"It is but one rule of construction that the consequences of a statute may be considered in construing its meaning. The rule may be counterpoised by other rules; it may be prevailed over by one which requires the intent of the statute to be looked for in its words. Where they are clear and involve no absurdity, they are its only expositors. It is not contended that the provisions which we are considering are not clearly expressed adequate to convey a definite meaning. It is true, it is urged that the word 'preference' imports the conscious participation of the creditor and debtor in the same intent. We cannot concur in that view, and we are brought to the consequences of the construction which we have put upon Section 60. It is denominated absurd by appellants. What is the test of absurdity? The contradiction of reason, it may be said, and to make an immediate application to legislation the contradiction of the reason which grows out of the subject-matter of the legislation and the purpose of the legislators. But all legislation is not simple, nor its consequences obvious, or to be controlled, even if obvious. Whether there should be any legislation at all, and its extent and form, may be matters of dispute. Its consequences may be viewed with favor or with

alarm; some regretted, but accepted as inevitable, —accepted as the shadow side of the good. In such situation it is for the legislature to determine, and it is very certain that the judiciary should not refuse to execute that determination from its view of some consequences which, (to use the thought and nearly the words of Chief Justice Marshall), may have been contemplated and appreciated when the Act was passed, and considered as overbalanced by the particular advantages the Act was calculated to produce."

At the time of the adoption of the Transportation Act, 1920, electric railways of the type of petitioner's railway had been treated and described as interurban electric railways under several prior Acts of Congress dealing with electric railways.

Under the Act of June 18, 1910, Chap. 309, 36 Stat. at L., 539, 552, the Commission had established, for freight, through routes and joint rates between interurban electric railways and steam railroads. *Chicago & Milwaukee Electric R. Co.* v. *Illinois C. R. Co.*, 13 I. C. C. 20; *Cedar Rapids & I. C. R. & Light Co.* v. *Chicago & Northwestern R. Co.*, 13 I. C. C. 250; *Louisville Board of Trade* v. *Indianapolis, Columbus & Southern Traction Co.*, 27 I. C. C. 499; *St. Louis, Springfield & Peoria R. R.* v. *P. P. & U. Ry. Co.*, 26 I. C. C. 226; and numerous other cases cited in *United States* v. *Village of Hubbard*, 266 U. S. 474, Note 4.

The Federal Control Act of March 21, 1918, 40 Stat. L., 451, contained the proviso to Paragraph 7 of Section I, "that nothing in this paragraph shall be construed as including any street or interurban electric railway which

has as its principal source of operating revenue urban, suburban or interurban passenger traffic or sale of power, heat and light, or both." Several interurban electric railways, including petitioner's railway, were taken under Federal Control under this proviso of the Act. (House Hearings, 66th Congress, First Session, Volume 15, p. 2796).

On July 2, 1918, Congress passed the Railway Mail Pay Service on Urban and Interurban Electric Railways Act, 40 Stat. L., 748, 39 U. S. C. A., Secs. 569, 570, in which the Commission was empowered and directed to "fix and determine from time to time the fair and reasonable rates and compensation for the transportation of mail matter by urban and interurban electric railway common carriers."

In *Electric Railway Mail Pay*, 58 I. C. C. 455, the Commission complying with this direction filed its report on August 7, 1920, saying:

> "There are three kinds or classes of electric lines, each of which is employed to some extent in the carriage of the mails. They are known as urban or city lines, suburban lines, or interurban lines. Urban lines comprise those operating wholly within cities. * * *
>
> "Interurban lines, as the term implies, run between two or more cities. They are operated in some respects like steam roads, so far as mail transportation is concerned. Many of them do considerable freight and express business in addition to their passenger business."

Petitioner has been paid for transporting United States mail in accordance with the order of the Interstate Commerce Commission made in the Electric Railway Mail Pay Case. (R. 361, 362).

The development of interurban electric roads had become general about 1902; since 1915 they had been required to file with the Commission annual reports of their finances and operations; and in exercising authority over their passenger fares the Commission had made no distinction between those interurban roads which were engaged in the general transportation of freight in addition to their passenger and express business, and those which were not. *United States* v. *Village of Hubbard*, 266 U. S. 474.

In *Chicago & M. Electric R. Co.* v. *Illinois C. R. Co.*, 13 I. C. C. 20, decided in 1908, the complainant (which is referred to in the Village of Hubbard case as an interurban electric railroad) was described in part as follows:

> "The tracks are laid with 80-pound rails and are well ballasted. The culverts and bridges are constructed of reinforced concrete. The record fully discloses and the defendants admit that so far as construction is concerned the complainant is able not only to handle freight in carloads but in trains. . . . The complainant has through routes and joint rates in effect with the Wisconsin Central Railroad Company."

In *Cedar Rapids & I. C. R. Co.* v. *Chicago & N. W. R. Co.*, 13 I. C. C. 250, decided in 1908, and also referred to in the Village of Hubbard case, the complainant was described as follows:

"Its roadbed, as is admitted by the defendant, is constructed in a substantial manner and in conformity with the standard that is usual with the smaller steam railroads in that section of the country. * * * The road crosses 28 well-built bridges and culverts constructed, as the complainant's witnesses state, upon plans that are practically identical with those used by the defendant in similar structures on its lines. In other respects the record satisfactorily shows that the complainant's line is capable of moving freight in trainloads as well as in carloads."

In *St. Louis, Springfield & Peoria R. R., et al,* v. *P. & P. U. Ry. Co.*, 26 I. C. C. 226, decided in 1913, the complainants which constituted the Illinois Traction Company were referred to by the Commission as "lines of interurban electric railway," operating 418 miles of railway and extending from St. Louis, Missouri, on the South, to Peoria, Ill., on the North, and to Danville and Ridge Farm, Ill., on the East, and in part were described as follows:

"The complainants conduct a general passenger and freight business, and their lines are standard gauge with rails and ballast of regular steam-road standard. * * * It is apparent from the evidence that the complainants' equipment is standard and such as may be interchanged in interstate traffic, and that their roadbed and bridges are built so as to permit the passage over them of standard railroad cars."

In *Chicago, Ottowa & Peoria Ry. Co.* v. *Chicago, Northwestern Ry. Co.*, 33 I. C. C. 573, decided in 1915, the Commission said:

> "Our authority upon a proper showing to require the establishment by steam railroads of through routes and joint rates with interurban electric railroads engaged in interstate transportation of freight has long been settled."

In *Louisville Board of Trade* v. *Indianapolis, Columbus and Southern Traction Co., et al*, 27 I. C. C. 499, decided in 1913, the Commission established through routes and joint rates "over interurban electric lines between Louisville and points in Indiana." At page 504, the Commission said, "these companies are common carriers and are engaged in interstate traffic; it is therefore their duty, under express and affirmative provisions in the act, to provide cars and other reasonable facilities necessary properly to serve the public."

This history of interurban electric railways "may be noticed in confirmation of the meaning conveyed by the words used" in paragraph 22. *United States* v. *Missouri P. R. Co.*, 278 U. S. 269, 278.

In several sections of the Transportation Act, 1920, Congress provided expressly for the exclusion of certain electric railways from the operation of the powers conferred on the Commission. In each section it used plain language to express its intent. Had Congress intended to make the exclusion of an interurban electric railway from the provisions of paragraph 18 depend upon the character and volume of its traffic, or on whether or not it is operated in competition with steam railroads, it would have used appropriate language to express this

purpose. The failure of Congress to make the exclusion depend upon either of these considerations shows that Congress had no such purpose.

## Conclusion.

It is respectfully submitted that the decree below should be reversed.

H. J. HAYNSWORTH,
R. S. HUTCHISON,
W. S. O'B. ROBINSON, JR.,
*Counsel for Petitioner.*

CHARLOTTE, N. C., April 2, 1932.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1931

No. 664

PIEDMONT AND NORTHERN RAILWAY COMPANY, PETITIONER,

*v.*

INTERSTATE COMMERCE COMMISSION, SOUTHERN RAILWAY COMPANY, CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY, ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, CAROLINA, CLINCHFIELD & OHIO RAILWAY, CAROLINA, CLINCHFIELD & OHIO RAILWAY OF SOUTH CAROLINA, AND CLINCHFIELD NORTHERN RAILWAY OF KENTUCKY, RESPONDENTS.

## SUPPLEMENTAL BRIEF FOR PIEDMONT AND NORTHERN RAILWAY COMPANY, PETITIONER.

H. J. HAYNSWORTH,
R. S. HUTCHINSON,
W. S. O'B. ROBINSON, JR.,
*Counsel for Petitioner.*

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## SUPPLEMENTAL BRIEF FOR PIEDMONT AND NORTHERN RAILWAY COMPANY, PETITIONER.

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### Statement of Case.

To the statement of the case contained in the petition for a writ of certiorari (pp. 2-9), petitioner desires to add the following statement of the facts on which it relies in support of the contention that its railway is "an interurban electric railway, which is not operated as a part or parts of a general steam railroad system of transportation":

Until the Commission's ruling of April 3, 1928, in *Proposed Construction of Lines by Piedmont and Northern Railway Company*, 138 I. C. C. 363, petitioner's railway had been officially treated and dealt with by the Interstate Commerce Commission, the U. S. Railroad Administration, the U. S. Labor Board and other federal authorities as an interurban electric railway. (R. 173, 362-365, 450, 451). It has made reports of its operations and finances to the Interstate Commerce Commission under the accounting rules governing electric railways. (R. 365). It was taken over by the government under the proviso contained in the seventh paragraph of Section I of the Federal Control Act of March 21, 1918, (40 Stat. L. 451), including within "Federal Control" interurban electric railways whose principal source of operating revenue was freight traffic (U. S. House Hearings, 66th Congress, First Session, Vol. 15, p. 2796). The Commission on October 12, 1920, ruled informally that it was an interurban electric railway not operated as a part of a general steam railroad system of transportation, and that it was therefore within the exemption contained in Section 20a exempting such railways from the authority of the Commission over the issuance of carrier securities. (R. 362). On December 11, 1920, the U. S. Railroad Labor Board ruled in Decision No. 33, Docket 26-a, that for the same reason it was not subject to the jurisdiction of the Labor Board. (R. 173). It is paid by the Post Office Department for transporting United States mail as an interurban electric railway, in accordance with the order of the Interstate Commerce Commission of August 7th, 1920, in Electric Railway Mail Pay, 58 I. C. C., 455. (R. 361).

Its lines connect and tie in with the street railway systems in the cities and towns through which it operates.

(R. 380). Of its main line mileage 15.13 miles is operated jointly with street car lines. (R. 184). The first properties acquired were the street railway properties in Anderson, Greenville and Charlotte, which were acquired in order that the lines to be built between the cities might be tied in with the street railway systems, thus affording these lines access to and terminals in the principal cities en route and assuring the interurban lines of trackage rights over the street railway systems. (R. 380).

On March 10, 1910, the Greenville, Spartanburg and Anderson Railway Company was incorporated under the general laws of the State of South Carolina. (R. 143). It purchased the existing interurban electric railway between Belton and Anderson, South Carolina, a distance of about 10½ miles, and constructed the line in South Carolina from Greenwood to Spartanburg. (R. 382).

On January 6, 1910, the Piedmont Traction Company was incorporated under the laws of the State of North Carolina as a street railway company, and constructed the line in North Carolina between Gastonia and Charlotte, and also the street railway system in Gastonia. (R. 143, 382).

The Piedmont and Northern Railway Company was incorporated by Special Act of the Legislature approved February 24, 1911, (R. 156), and thereafter the properties formerly owned and operated by the Piedmont Traction Company and the Greenville, Spartanburg and Anderson Railway Company were conveyed to it. These properties included the line from Charlotte to Gastonia, the street railway system in Gastonia, trackage rights over the street railway system in Charlotte, the lines in South Carolina from Greenwood to Spartanburg, and

from Anderson to Belton, and trackage rights over the street railway systems in Anderson and Greenville. (R. 382.)

Petitioner's railway is, and has always been, operated exclusively by electricity as a motive power, (R. 386); and it is not, and has never been, operated as a part of any steam railroad system of transportation. (R. 387).

The voltage used in the operation of petitioner's railway is 1500 direct current supplied through an overhead trolley supported by poles, (R. 310, 387), as compared with 3000 volts direct current or 11,000 alternating current ordinarily used on electrified sections of steam railroads. (R. 347). The volume and character of voltage required on an electric railroad is determined by the character of service to be performed and the volume of traffic to be moved; where traffic is moved in small units and at frequent intervals the lower voltage of 1500 D. C. is suitable and feasible, but where traffic is heavy, moving less frequently and in heavier train loads the higher voltage of 3000 D. C. or 11,000 A. C. is required. (R. 347).

The overhead construction and power supply of petitioner's railway is similar to that which was used on many of the early electric railways constructed about 1902, (R. 310, 311); and differs radically from the overhead construction in use on electrified sections of steam railroads. (R. 312, 348).

The substation capacity on petitioner's railway is approximately 75 Kilowatts per mile, whereas in steam railroad electrification it is never lower than 150 and runs as high as 1000 Kilowatts per mile. (R. 319). The substation capacity is low not only in respect of individual units, but also in respect of the total capacity of the en-

tire road. For example, the total capacity of petitioner's railway consisting of 129 miles is 10,600 Kilowatts, as compared with 36,000 Kilowatts on the electrified section of the Delaware and Lackawanna, consisting of 160 miles. (R. 370).

If petitioner were to change its railway and equipment so as to be able to haul larger trains and use larger locomotives, (such as those used on electrified sections of steam railroads), the whole road would have to be revised, the existing substations abandoned and others built in their place. (R. 370).

Petitioner's signal system is a selective control block system which would not be suitable for use on a main line steam railroad. (R. 311, 376).

Petitioner's locomotives vary in weight from 50 to 100 tons, (R. 316), and are decidedly lighter and smaller than those in use on electrified divisions of steam railroads, (R. 344, 345), and would not be suitable or feasible for use on an electrified division of a steam railroad. (R. 345, 370). All the locomotives are designed so that they can be used on every mile of petitioner's railway, and in this respect also they differ from the practice on electrified divisions of steam railroads where several classes of locomotives are used for different purposes, such as one type for switching operations and another for main line operations. (R. 370). Petitioner's locomotives are the type commonly known as interurban locomotives; they are constructed on swivel type trucks, whereas locomotives on electrified sections of steam railroads have a rigid wheel base. (R. 316, 317).

The passenger cars are motivated by self-contained motor units instead of being drawn by locomotives; they

are lighted in series from the trolley, are equipped with radial drawbars enabling them to make sharp turns; all but six of the twenty-two passenger cars are equipped with double-end control so that they may be operated from either end; and all of them are equipped with multiple unit control so that if two of them are coupled together they may be operated by one motorman. (R. 315). Its passenger cars make frequent stops, averaging 1.2 miles apart. (R. 169). Its freight trains are operated in small units and at frequent intervals; they set out and pick up freight all along the line; and use the street railway lines to pick up and deliver freight within the cities. (R. 172, 179, 373, 374, 375).

## Question Presented.

The question presented is whether or not petitioner's railway is "an interurban electric railway, which is not operated as a part or parts of a general steam railroad system of transportation," within the meaning of the language of Section I, Paragraph 22, of the Interstate Commerce Act, as amended by Transportation Act, 1920, (49 U. S. C. A., Sec. I(22)), excluding such railways from the scope of the provisions of Paragraph 18 which prohibits any carrier by railroad subject to the Act from undertaking any extension of its lines or construction of new lines, without first obtaining from the Interstate Commerce Commission a certificate of public convenience and necessity.

This question is raised by Assignments of Error VI to XXI, (R. 496-502), and by the petition for the writ of certiorari.

## ARGUMENT.

### V.

**The language of Paragraph 22 of Section I of the Interstate Commerce Act, as amended by Transportation Act, 1920, exempting "interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation" from the scope of the provisions of Paragraph 18, being plain and unambiguous, especially when read in connection with the other provisions of the Act dealing with electric railways, leaves no room for a construction rejecting the literal meaning of its terms.**

Paragraph 22 makes the test of Federal jurisdiction over the construction and abandonment of lines by interurban electric railways depend solely on whether or not such railways are operated as a part or parts of a general steam railroad system of transportation. If they are so operated the Interstate Commerce Commission has jurisdiction. If they are not so operated jurisdiction is left with the state authorities.

The language of the statute is plain and unambiguous and leaves no room for a construction which would make the jurisdiction of the Commission over the construction of electric railways depend upon the effect which the construction would have in diverting interstate traffic from other carriers by railroad, who are subject to the Act.

In *Crooks v. Harrelson*, 282 U. S. 55, 75 L. ed. 156, the court in disposing of a contention that the literal meaning of a section of the Revenue Act of 1918 should be rejected because it would lead to absurd results, said:

"It is urged, however, that if the literal meaning of the statute be as indicated above, that meaning should be rejected as leading to absurd results, and a construction adopted in harmony with what is thought to be the spirit and purpose of the act in order to give effect to the intent of Congress. The principle sought to be applied is that followed by this Court in *Church of the Holy Trinity* v. *United States*, 143 U. S. 457, 36 L. ed. 226, 12 S. Ct. 511; but a consideration of what is there said will disclose that the principle is to be applied to override the literal terms of a statute only under rare and exceptional circumstances. The illustrative cases cited in the opinion demonstrate that to justify a departure from the letter of the law upon that ground, the absurdity must be so gross as to shock the general moral or common sense. Compare *Pirie* v. *Chicago, Title & T. Co.*, 182 U. S. 438, 451, 452, 45 L. ed. 1171, 1178, 1179, 21 S. Ct. 906. And there must be something to make plain the intent of Congress that the letter of the statute is not to prevail. *Treat* v. *White*, 181 U. S. 264, 268, 45 L. ed. 853, 854; 21 S. Ct. 611."

"Courts have sometimes exercised a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear in order to escape consequences thought to be absurd or to entail great hardship. But an application of the principle so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usur-

pation of the latter. *Monson* v. *Chester*, 22 Pick. 385, 387. It is not enough merely that hard and objectionable or absurd consequences, which probably were not within the contemplation of the framers, are produced by an act of legislation. Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts. See *Re Alma Spinning Co.* L. R. 16 Ch. Div. 681, 686; 7 Eng. Rul. Cas. 589; *Rex* v. *Commissioners of Navigation*, 5 Ad. & El. 804, 816; 111 Eng. Reprint, 1370; *Abley* v. *Dale* (1851) 20L. J. C. P. N. S. 33, 35. And see generally *Chung Fook* v. *White*, 264 U. S. 443, 445, 68 L. ed. 781, 782, 44 S. Ct. 361; *Commissioner of Immigration* v. *Gottlieb*, 265 U. S. 310, 313, 68 L. ed. 1031, 1033; 44 S. Ct. 528."

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"The language of that provision is so clear and its meaning so plain that no difficulty attends its construction in this case. Adherence to its terms leads to nothing impossible or plainly unreasonable. We are therefore bound by the words employed and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. It is elementary that where no ambiguity exists there is no room for construc-

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"It would be dangerous in the extreme to infer that from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation. Where words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. But if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not

intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application."

In *Pirie* v. *Chicago Title & Trust Co.*, 182 U. S. 438, 451, Mr. Justice McKenna said:

"It is but one rule of construction that the consequences of a statute may be considered in construing its meaning. The rule may be counterpoised by other rules; it may be prevailed over by one which requires the intent of the statute to be looked for in its words. Where they are clear and involve no absurdity, they are its only expositors. It is not contended that the provisions which we are considering are not clearly expressed adequate to convey a definite meaning. It is true, it is urged that the word 'preference' imports the conscious participation of the creditor and debtor in the same intent. We cannot concur in that view, and we are brought to the consequences of the construction which we have put upon Section 60. It is denominated absurd by appellants. What is the test of absurdity? The contradiction of reason, it may be said, and to make an immediate application to legislation the contradiction of the reason which grows out of the subject-matter of the legislation and the purpose of the legislators. But all legislation is not simple, nor its consequences obvious, or to be controlled, even if obvious. Whether there should be any legislation at all, and its extent and form, may be matters of dispute. Its consequences may be viewed with favor or with

alarm; some regretted, but accepted as inevitable, —accepted as the shadow side of the good. In such situation it is for the legislature to determine, and it is very certain that the judiciary should not refuse to execute that determination from its view of some consequences which, (to use the thought and nearly the words of Chief Justice Marshall), may have been contemplated and appreciated when the Act was passed, and considered as overbalanced by the particular advantages the Act was calculated to produce."

At the time of the adoption of the Transportation Act, 1920, electric railways of the type of petitioner's railway had been treated and described as interurban electric railways under several prior Acts of Congress dealing with electric railways.

Under the Act of June 18, 1910, Chap. 309, 36 Stat. at L., 539, 552, the Commission had established, for freight, through routes and joint rates between interurban electric railways and steam railroads. *Chicago & Milwaukee Electric R. Co.* v. *Illinois C. R. Co.*, 13 I. C. C. 20; *Cedar Rapids & I. C. R. & Light Co.* v. *Chicago & Northwestern R. Co.*, 13 I. C. C. 250; *Louisville Board of Trade* v. *Indianapolis, Columbus & Southern Traction Co.*, 27 I. C. C. 499; *St. Louis, Springfield & Peoria R. R.* v. *P. P. & U. Ry. Co.*, 26 I. C. C. 226; and numerous other cases cited in *United States* v. *Village of Hubbard*, 266 U. S. 474, Note 4.

The Federal Control Act of March 21, 1918, 40 Stat. L., 451, contained the proviso to Paragraph 7 of Section I, "that nothing in this paragraph shall be construed as including any street or interurban electric railway which

has as its principal source of operating revenue urban, suburban or interurban passenger traffic or sale of power, heat and light, or both." Several interurban electric railways, including petitioner's railway, were taken under Federal Control under this proviso of the Act. (House Hearings, 66th Congress, First Session, Volume 15, p. 2796).

On July 2, 1918, Congress passed the Railway Mail Pay Service on Urban and Interurban Electric Railways Act, 40 Stat. L., 748, 39 U. S. C. A., Secs. 569, 570, in which the Commission was empowered and directed to "fix and determine from time to time the fair and reasonable rates and compensation for the transportation of mail matter by urban and interurban electric railway common carriers."

In *Electric Railway Mail Pay*, 58 I. C. C. 455, the Commission complying with this direction filed its report on August 7, 1920, saying:

> "There are three kinds or classes of electric lines, each of which is employed to some extent in the carriage of the mails. They are known as urban or city lines, suburban lines, or interurban lines. Urban lines comprise those operating wholly within cities. * * *
>
> "Interurban lines, as the term implies, run between two or more cities. They are operated in some respects like steam roads, so far as mail transportation is concerned. Many of them do considerable freight and express business in addition to their passenger business."

Petitioner has been paid for transporting United States mail in accordance with the order of the Interstate Commerce Commission made in the Electric Railway Mail Pay Case. (R. 361, 362).

The development of interurban electric roads had become general about 1902; since 1915 they had been required to file with the Commission annual reports of their finances and operations; and in exercising authority over their passenger fares the Commission had made no distinction between those interurban roads which were engaged in the general transportation of freight in addition to their passenger and express business, and those which were not. *United States* v. *Village of Hubbard*, 266 U. S. 474.

In *Chicago & M. Electric R. Co.* v. *Illinois C. R. Co.*, 13 I. C. C. 20, decided in 1908, the complainant (which is referred to in the Village of Hubbard case as an interurban electric railroad) was described in part as follows:

> "The tracks are laid with 80-pound rails and are well ballasted. The culverts and bridges are constructed of reinforced concrete. The record fully discloses and the defendants admit that so far as construction is concerned the complainant is able not only to handle freight in carloads but in trains. . . . The complainant has through routes and joint rates in effect with the Wisconsin Central Railroad Company."

In *Cedar Rapids & I. C. R. Co.* v. *Chicago & N. W. R. Co.*, 13 I. C. C. 250, decided in 1908, and also referred to in the Village of Hubbard case, the complainant was described as follows:

"Its roadbed, as is admitted by the defendant, is constructed in a substantial manner and in conformity with the standard that is usual with the smaller steam railroads in that section of the country. * * * The road crosses 28 well-built bridges and culverts constructed, as the complainant's witnesses state, upon plans that are practically identical with those used by the defendant in similar structures on its lines. In other respects the record satisfactorily shows that the complainant's line is capable of moving freight in trainloads as well as in carloads."

In *St. Louis, Springfield & Peoria R. R., et al,* v. *P. & P. U. Ry. Co.*, 26 I. C. C. 226, decided in 1913, the complainants which constituted the Illinois Traction Company were referred to by the Commission as "lines of interurban electric railway," operating 418 miles of railway and extending from St. Louis, Missouri, on the South, to Peoria, Ill., on the North, and to Danville and Ridge Farm, Ill., on the East, and in part were described as follows:

"The complainants conduct a general passenger and freight business, and their lines are standard gauge with rails and ballast of regular steam-road standard. * * * It is apparent from the evidence that the complainants' equipment is standard and such as may be interchanged in interstate traffic, and that their roadbed and bridges are built so as to permit the passage over them of standard railroad cars."

In *Chicago, Ottowa & Peoria Ry. Co.* v. *Chicago Northwestern Ry. Co.*, 33 I. C. C. 573, decided in 1915, the Commission said:

> "Our authority upon a proper showing to require the establishment by steam railroads of through routes and joint rates with interurban electric railroads engaged in interstate transportation of freight has long been settled."

In *Louisville Board of Trade* v. *Indianapolis, Columbus and Southern Traction Co., et al*, 27 I. C. C. 499, decided in 1913, the Commission established through routes and joint rates "over interurban electric lines between Louisville and points in Indiana." At page 504, the Commission said, "these companies are common carriers and are engaged in interstate traffic; it is therefore their duty, under express and affirmative provisions in the act, to provide cars and other reasonable facilities necessary properly to serve the public."

This history of interurban electric railways "may be noticed in confirmation of the meaning conveyed by the words used" in paragraph 22. *United States* v. *Missouri P. R. Co.*, 278 U. S. 269, 278.

In several sections of the Transportation Act, 1920, Congress provided expressly for the exclusion of certain electric railways from the operation of the powers conferred on the Commission. In each section it used plain language to express its intent. Had Congress intended to make the exclusion of an interurban electric railway from the provisions of paragraph 18 depend upon the character and volume of its traffic, or on whether or not it is operated in competition with steam railroads, it would have used appropriate language to express this

purpose. The failure of Congress to make the exclusion depend upon either of these considerations shows that Congress had no such purpose.

## Conclusion

It is respectfully submitted that the decree below should be reversed.

H. J. HAYNSWORTH,
R. S. HUTCHINSON,
W. S. O'B. ROBINSON, JR.,
*Counsel for Petitioner.*

CHARLOTTE, N. C., April 2, 1932.

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## ADDENDUM

Petitioner desires to call the Court's attention to the case of *United States* v. *Chicago, North Shore & Milwaukee Railroad Company*, decided by District Judge Chas. E. Woodward, in the U. S. District Court, for the Northern District of Illinois, on March 24, 1932.

The suit was brought to enjoin the defendant from issuing securities without first obtaining the approval of the Interstate Commerce Commission under Section 20a of the Interstate Commerce Act, as amended by Transportation Act of 1920. Paragraph 1 of Section 20a exempts from the scope of the provisions of that section an "interurban electric railway which is not operated as a part of a general steam railroad system of transportation." The Chicago, North Shore & Milwaukee Railroad Company defended on the ground that

it is such an interurban electric railway within the scope of that exemption, and Judge Woodward sustained the defense and dismissed the suit.

As Judge Woodward's decision in the Chicago, North Shore & Milwaukee Railroad Company case has not been reported either officially or in the National Reporter System, we are attaching a copy of it as an appendix hereto.

It will be noted from Judge Woodward's findings of fact that the Chicago, North Shore & Milwaukee Railroad Company is an interstate carrier of freight and passengers of at least as much national importance as petitioner's railroad is now, or would be after the construction of the proposed extensions. The freight revenues of the Chicago, North Shore & Milwaukee Railroad are almost as large as those of petitioner, and in addition the Chicago Railroad has passenger revenues which are even larger than its freight revenues, whereas petitioner through no fault of its own has lost most of its passenger business. The Chicago Railroad competes with steam railroads for both freight and passenger business, and diverts from them both classes of traffic.

If Judge Glenn's construction of the statute had been applied in the Chicago case, that railroad would have been denied the exemption which it claimed; while if Judge Woodward's construction is correct petitioner is entitled to the exemption which it claims. Judge Glenn disregarded the literal meaning of the statute, and adopted a construction which he thought was in harmony with the underlying spirit and purpose of the amendments which the Transportation Act of 1920 introduced into the Interstate Commerce Act.

Judge Woodward adhered to the literal meaning of the language of the statute and came to a decision very nearly, if not exactly, the opposite of Judge Glenn's.

A comparison of the two cases and of the two decisions, one allowing the exemption and the other denying it, makes manifest the confusion which will result unless the statute is construed in accordance with the meaning which its terms plainly import.

Petitioner does not argue that a transcontinental steam railroad, or a steam railroad engaged in the long haul of heavy load traffic and the operation of through passenger trains between widely separated sections of the country, would merely by abolishing steam and adopting electricity as a motive power become an interurban electric railway.

But petitioner is not a railroad of this character. It is interurban, it is operated exclusively by electricity as a motive power, and it is not operated as a part of any steam railroad system of transportation. It is not a carrier of national importance except in the sense that it is engaged in interstate commerce, and by reason of its connections with steam railroads is a part of through routes for the movement of freight. Its freight traffic, while large in comparison with its passenger traffic, is small in comparison with the freight traffic handled by any of the important steam railroads of the country. (R. 374.) It does not operate between large cities, and over its own rails does not reach any important gateway or any port. Its operations are confined to the Piedmont section of North and South Carolina. It moves traffic between points in this section, and into and out of this section from connections with steam railroads. (R. 177, 178.) It has

been constructed and equipped and is maintained and operated in accordance with the standards and practices of those electric railways which by common usage have been known as interurban electric railways. (R. 311-324; 344-349; 368-377.)

Respectfully submitted,

H. J. HAYNSWORTH,
R. S. HUTCHINSON,
W. S. O'B. ROBINSON, JR.,

*Counsel for Petitioner.*

Charlotte, N. C., April 14, 1932.

# APPENDIX

IN THE

## District Court of the United States Northern District of Illinois Eastern Division

No. 10067

UNITED STATES OF AMERICA

*v.*

CHICAGO, NORTH SHORE AND MILWAUKEE RAILROAD COMPANY

The above entitled suit coming on to be heard, and the court having heard the evidence and arguments of counsel, and briefs having been filed, and the court being advised in the premises, now finds as

### FINDINGS OF FACTS

(1) That this suit was brought and the prayer seeks only to enjoin and restrain the respondent in the future from issuing any capital stock, bonds or other evidence of indebtedness, collectively termed "securities," and from assuming any obligations or liability as guarantor, endorser, surety or otherwise, in respect of the securities of any other person or corporation unless respondent shall have first applied for and obtained the approval and appropriate order from the Interstate Commerce Commission.

(2) CORPORATE HISTORY OF CHICAGO, NORTH SHORE AND MILWAUKEE RAILROAD COMPANY.

The Chicago, North Shore and Milwaukee Railroad Company, and the predecessor corporation, owning and operating, subsequent to March 1, 1920, the properties now owned and operated by it, is and were corporations organized, chartered and existing under and by virtue of the Statutes of the State of Illinois, sometimes described as the General Railroad Laws of the State of Illinois, and more particularly described as "An Act to provide for the incorporation of associations that may be recognized for the purpose of constructing railways, maintaining and operating the same; for prescribing and defining the duties and limiting the powers of such corporations when so recognized, and authorizing the same and all railroad companies of the State to own and hold the stock and securities of railroad companies of other States owning a connecting line," being Chapter 114 of Cahill's 1921 Illinois Revised Statutes.

(3) There are but two statutory enactments in Illinois under which rail carriers may be organized; one is the General Railroad Act and the other is the General Incorporation Act. The General Incorporation Act is commonly used for the organization of street railways and under it the street railway has limited powers of eminent domain. Practically all rail carriers, save street railways, organized in Illinois, are organized under the so-called General Railroad Act because of the very limited powers of eminent domain given corporations organized under the General Incorporation Act. The Chicago Rapid

Transit Company, which operates the intra mural city service over the elevated structure in Chicago is incorporated under the General Railroad Act of Illinois.

(4) The Bluff City Electric Street Railway Company, a street railroad was the original company out of which the properties of the respondent developed. The Bluff City line was in existence prior to 1905. On July 1, 1916, the receiver of the Chicago and Milwaukee Electric Railroad Company of Illinois and the Chicago and Milwaukee Electric Railroad Company of Wisconsin sold at receiver's sale these two properties to the Chicago, North Shore and Milwaukee Railroad. As a result of a later reorganization, at 12:01 A.M., on July 1, 1923, the railroad property of that company was conveyed to the Chicago, North Shore and Milwaukee Railroad Company. On October 6, 1924, this latter company was consolidated with the Chicago, North Shore and Northern Railroad, an Illinois intrastate railway, under the corporate name, Chicago, North Shore and Milwaukee Railroad Company, the respondent, which has owned and operated the properties at all times since then.

(5) TYPE OF CONSTRUCTION OF TRACKS, BRIDGES, ROADBED AND OTHER PHYSICAL PROPERTIES OF THE CHICAGO, NORTH SHORE AND MILWAUKEE RAILROAD COMPANY:

**1. Description of Respondent's Line.**

(a) The respondent operates a high-speed electrified railroad between Chicago, Illinois, and Milwaukee, Wisconsin, serving states with a total population of approximately four million. The main terminals are

in Chicago and Milwaukee, with branch-line terminals in the cities of Waukegan, Illinois, and Mundelein, Illinois.

(b) The operation in Chicago is over the elevated tracks of the Chicago Rapid Transit Company from 63rd and Dorchester streets on the south side of Chicago, northerly through the Loop district, where the main Chicago passenger terminal is located, to a point at Leland and Wilson Avenues on the north side of Chicago, a distance of approximately 16 miles; thence northerly through Chicago and Evanston to Wilmette, a distance of approximaely 8 miles over elevated, dirt-fill tracks, leased from the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, and jointly used with the Rapid Transit Company.

(c) The so-called "Shore Line" route continues north from Linden Avenue in Wilmette through Kenilworth, Winnetka, Glencoe, Highland Park, Highwood, Lake Forest, Lake Bluff and North Chicago Junction, where it joins with the Skokie Valley Line to Zion City and the State line, a distance of 31.77 miles.

(d) The "Skokie Valley Line" departs from the Shore Line route at Howard Street, the north city limit of Chicago, and runs west about three miles to Niles Center, and thence northerly, paralleling the Shore Line, to a junction with the Shore Line at North Chicago Junction, a distance of 36.29 miles.

(e) From the State line, the road continues north via Kenosha and Racine, to Harrison street, Milwaukee, a distance of 35.92 miles. From this point the operation is through the streets, over the tracks of the Chi-

cago and Milwaukee Electric Railway Company, which company is owned by the respondent, a distance of 2.67 miles. Street cars also operate over a small portion of the line from Harrison street to Oklahoma Boulevard, and such operation is under an ordinance authorizing a predecessor of respondent to "operate its interurban cars" over such tracks. Such operation is on the streets in common with vehicular traffic and is controlled in part by "stop and go" lights.

(f) The "Libertyville Branch" extends from Lake Bluff on the Shore Line to Rondout, Libertyville and Mundelein, a distance of 8.8 miles.

(g) The "Waukegan Branch" extends from North Chicago Junction into the City of Waukegan, a distance of 3.29 miles. Respondent performs all of the street car service in Waukegan. Approximately 12 cars are used in this service. The Chicago-Waukegan interurban express trains use the street car tracks in Waukegan. The Waukegan street cars use the main line tracks south from Waukegan to Great Lakes Naval Training Station in common with the respondent's interurban express trains. The operation of the street cars and of the Chicago-Waukegan interurban express trains in Waukegan is in common with other vehicular traffic on the streets. Passengers on the interurban trains of respondent to and from Waukegan are given free transfers which permit them to ride to any point on the street car system within Waukegan.

(h) The total route miles of main line owned and operated by the respondent is 138.38. The total miles of second track is 132.82. The total miles of yard and other track is 42.60. The total number of miles of all

track is 313.81. The total route miles of track operated in city streets is 20.229, which is 14.66 per cent. of the total route miles of track. Respondent operates on many of the city streets in common with street cars and vehicular traffic.

**2. Tracks and Rights of Way.**

(a) The tracks of the respondent are standard gauge, the owned line for train operation being all double-track with the exception of about 0.67 mile just south of Milwaukee, and about 0.6 of a mile on the Libertyville or Mundelein Branch.

(b) The operation over the lines of the Chicago Rapid Transit Company and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company is double-track and multiple-track. The operation in Milwaukee is double-track.

(c) The rights of way and tracks of the Chicago and North Western Railway Company parallel the respondent's right of way and tracks, the tracks of these two carriers reaching the same cities between Chicago and Milwaukee.

(d) Of the respondent's total owned tracks, 2.4 miles are laid in paved streets; 0.197 miles are laid in unpaved portion of streets; 2.8 miles are laid in unpaved street area, the track zone not being used for street purposes. In Milwaukee the respondent's passenger trains move over 2.6 miles of track in streets, the track being owned by the Chicago and Milwaukee Electric Railway Company, which company in turn is owned by the respondent. These tracks are used for street railway service.

(e) In Chicago the respondent's passenger and merchandise despatch trains operate over tracks owned by the Chicago Rapid Transit Company and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, under trackage leases or agreements with those carriers. The miles of track included in this operation, respectively, are: first main track, 16.97 and 7.83; total trackage so operated 33.94 and 15.89, or a total of 39.38 miles of track not owned, but used by the respondent under lease or agreement with those carriers. The operation over the tracks of the Chicago Rapid Transit Company is under a long-term lease.

(f) Respondent owns its right of way from Wilmette to Milwaukee, except for short distances, aggregating about three miles, in a few municipalities through which it runs on public thoroughfares. It owns all of the right of way of the Skokie Valley Line.

(g) The respondent has more than one-half mile of right of way in the Fort Sheridan Military Reservation, which it enjoys under perpetual easement granted by Congress. (See 42 Stat. L., 622-623.)

(h) From Waukegan, north to Milwaukee, the right of way averages about 100 feet in width. South from North Chicago to the connection with the line of the Chicago Rapid Transit Company the right of way averages in width from 25 to 100 feet, the greater part being about 50 feet.

(i) The right of way on the Skokie Valley Line is wide enough to accommodate a four-track line, part of it being used for the steel towers carrying the high-tension transmission line of the Public Service Company of Northern Illinois.

(j) Respondent has acquired part of its right of way through the exercise of the power of eminent domain.

(k) The respondent's roadways and tracks in many places follow the contour of the ground. Its track consists of ties and steel rails of varying weights and types. In many places it uses the High T and girder type rail designed especially for use in paved streets. It also uses frogs and switches designed for paved city track construction. Special steel ties are used for track in pavement.

(l) Respondent has many curves in its main line tracks as well as shop and yard tracks of 100 feet radius or less. This curvature in tracks is common to electric railways which must operate around street corners. Trains of steam railroads could not operate around such curves.

**3. Bridges.**

(a) Respondent's bridges are built according to steam railway specifications and standards, and are suitable for the operation of standard freight cars of steam railroads.

(b) On the west side, from North Chicago Junction to Milwaukee, the bridges are built according to Cooper's E-40 specifications, and have a standard load capacity sufficient to support two locomotives weighing 146 tons, each with the same distance between the front and rear axle and stipulated or uniform load of 4,000 pounds per foot.

(c) The bridges on the "Shore Line" route between Chicago and North Chicago Junction, which is mainly a passenger line, are built according to Cooper's E-30 specifications, and will support two locomotives weighing 106 tons each and a load of 3,000 pounds per lineal foot.

(d) The carrying strength or load capacity of the bridges on its owned main line will support the average steam railroad train.

**4. Roadbed.**

(a) The grades on the "Shore Line" of the respondent generally follow the topography of the ground, being less than 0.4 of one per cent. on most of the tracks. The roadbed of the "Shore Line" is suitable for the operation over it of standard freight cars of steam railroads.

(b) Grades as high as 7 per cent. are encountered in the main line track of respondent. The Skokie Valley Line connects at Howard street with the Shore Line, and has a grade of 3 per cent. at that point. It also has a grade of 1.6 over a viaduct or bridge that crosses the highway near the Sanitary District plant. Respondent uses a short temporary cross-over track during construction work in paved streets. All main line trains operate over these temporary cross-over tracks. It would be impossible for steam line trains to use this type of cross-over track.

(c) The roadbed is ballasted with rock, slag, gravel and cinder ballast. More than three-fourths of the Skokie Valley Line is rock-ballasted. The ballast and

cross ties are the same as those ordinarily used by steam roads. Except for short distances where steel ties, or combination steel and wood ties are necessary, the ties used are oak, cedar and pine.

(d) Respondent's signals, switches and crossing protection devices are similar to those used on steam railways generally, the respondent's line being equipped with the most modern railroad block signal systems.

**5. Interchange Track Connections.**

The tracks of the respondent are physically connected with the tracks of four steam railroads at thirteen points on its line, and with three electric railroads at three points on its line. Carload freight shipments can be and are interchanged with steam railroads, without breaking bulk, at eight different points. The respondent has interchange track connections with the Soo Line, Elgin, Joliet and Eastern, the Chicago and North Western, and the Chicago, Milwaukee, St. Paul and Pacific, all steam railroads. The total capacity of the respondent's interchange tracks at these interchange points is approximately 365 freight cars.

**6. Industry Tracks.**

(a) Respondent has 108 industry, team and switch tracks at 37 stations on its line, which serve about 40 different types of industries and the general public. The respondent constructed more than three miles of side-tracks into industrial yards to increase its facilities for handling carload freight.

(b) In 1930 the respondent had 12 new industries located on its line. These industries are engaged in *manufacturing or handling* of coal, lumber, and building materials.

(c) The largest industrial or team-track facilities are at Waukegan, where the respondent has 14 industry or team tracks with a capacity of 209 freight cars or 155 passenger cars. Similar tracks at North Chicago will accommodate 109 cars; at Racine Quarry, 145 cars; at Crawford Avenue, 174 cars; at Kostner Avenue, 111 cars; and at Liberty Lake, 127 cars.

(d) The total capacity of respondent's industry or team tracks is 1,801 freight cars or 1,364 passenger cars.

**7. Yards and Terminals.**

(a) Respondent has 19 passing tracks with lengths varying from 300 feet to 1,900 feet, many of which are used as team or storage tracks, as well as for train passing.

(b) The respondent has a freight classification yard at Pettibone which it uses for classifying cars of inbound and outbound freight and making up trains for further movement. This yard consists of 11 tracks and has a capacity of 161 freight cars.

**8. Passenger Stations and Freight Depots.**

(a) The respondent maintains on its entire system of railroad 224 stations or stopping points at which it receives and discharges passengers. At 51 of these

stations there is a station agent who sells passenger tickets and performs other duties customarily performed by station agents. At 96 of these points the respondent maintains shelters and platforms. At 35 of these points the respondent maintains platforms only. At 42 points certain of the respondent's trains stop at streets or highways, where no facilities or platforms are provided.

(b) The main passenger station of respondent in Chicago is in a store building having a front width of 25 feet on Wabash Avenue between Adams street and Jackson Boulevard. This station is connected with the elevated structure of the Chicago Rapid Transit Company by a bridge leading to the elevated platform above the sidewalk. All stations on the elevated structure of the Chicago Rapid Transit Company in Chicago used by the respondent are used in common with the Rapid Transit Company. Respondent conducts no freight business at any of these stations. Several stations used by respondent on its owned line outside of Chicago are in store buildings adjacent to track on city streets.

(c) Two stations, with ticket agents, are maintained at Wilmette, Winnetka and Island Park. At Ravinia the respondent has a station consisting of a good type of small modern brick building, with platforms and canopies. At Central Avenue, the respondent's station is separated from the railway track by a portion of paved street and is located in a store building, part of which the respondent leases. It has the ordinary station facilities. At Highwood the respondent has a frame building, with ticket agent, platforms, ticket booth, and canopies partly covering the platform.

At Lake Forest the respondent maintains a very fine brick and stone station, being equipped with modern facilities. At Zion the respondent maintains a commodious brick station, with a large waiting room for men, a large waiting room for women, and with long platforms on both sides of its track. At Kenosha the respondent has a modern, up-to-date brick, concrete and stucco station building with a large waiting room, toilet facilities and rest rooms, and with brick and concrete platforms with canopy over a portion of the platform. On the Skokie Valley Line the respondent maintains stations at nine points which are combined depots and residences for the station or ticket agents, the buildings being five-room bungalows with one additional room adjoining the track being used for station purposes. The employees of the station use the bungalows as dwellings for which no rent is charged by the respondent.

(d) Freight depots, or buildings used exclusively for receiving and delivering freight, are maintained by the respondent at several of its stations. At Milwaukee there is a freight station of brick construction with sheltered platform to accommodate loading and unloading to or from vehicles. At Evanston there is a freight depot of brick construction used jointly with the Chicago, Milwaukee, St. Paul and Pacific Railroad.

(e) At a number of points on the respondent's line freight stations are maintained to accommodate the respondent's merchandise despatch or less-than-carload freight service. To accommodate this same service the respondent maintains in Chicago a number of receiving

stations. A considerable portion of the merchandise dispatch traffic is handled in Chicago at the Montrose Avenue station.

(f). The respondent maintains loading and unloading facilities in Chicago, Milwaukee and Racine for the accommodation of its ferry truck service.

**9. Offices and Shops.**

(a) The executive offices of the respondent are located in the Commonwealth Edison Building, 72 West Adams street, Chicago, Illinois. Its general operating offices are located at Highwood, Illinois.

(b) Respondent has repair shops adequate for the maintenance and repair of its rolling stock, its general repair shops being located at Highwood, Illinois.

(c) The 114 freight cars of respondent which are interchangeable with steam railroads are kept in repair at respondent's repair shop at Pettibone yard.

(d) Respondent has not found it necessary to have repairs, either to locomotives or to passenger or freight cars, made at outside shops, but has been able to make all necessary repairs at its own shops.

**10. Electrical Transmission Line.**

(a) On the Skokie Valley Line overhead power is conveyed by catenary type trolley lines supported on double standards, permitting high-speed operation.

(b) On the Shore Line the trolley wire is suspended from and between wooden poles, and is about 18 feet above the track.

(c) On the tracks of the Chicago Rapid Transit Company, the Chicago, Milwaukee, St. Paul and Pacific Railroad, and on respondent's tracks for about two miles between Howard street, in Chicago, and Crawford Avenue, in Niles Center, the current is fed by the third-rail system. A portion of the line of the third-rail, north of Howard street, has an overhead trolley in addition to the third-rail, for use in connection with the switching of freight for the Chicago, Milwaukee, St. Paul and Pacific Railroad.

(d) Respondent uses 600 volts direct current for its power. The electric power of 600 volts used by respondent is substantially less than the voltage used on most electricified sections of steam railroads. The use of higher voltage than 600 on lines that operate over paved streets, as does the respondent, would create a hazardous condition for the public in the event the line broke and the wire dropped.

(e) Six hundred volts direct current is sufficient to haul respondent's loaded equipment, and is the same voltage now used by the Pennsylvania Railroad for its entrance into and terminal operations at New York City. On electrified portions of steam lines other carriers use from 1,500 to 11,500 volts, and the Pennsylvania Railroad is changing to 11,000 volts.

**11. Investment in Road and Equipment.**

Respondent's investment in road and equipment on December 31, 1930, was $42,438,676.67.

(6) ROLLING STOCK AND OTHER MOBILE EQUIPMENT.

1. Locomotives.

(a) Respondent owns a total of 7 electric locomotives. Two of them are electric storage battery locomotives; 5 of them are operated by power transmitted from the trolley wire. Two of these locomotives will haul 1,200 tons per train; 3 will haul 600 tons per train, and 3 will haul 400 tons per train. Steam railroads haul several thousand tons in a train. These locomotives weigh 70, 60 and 50 tons respectively. The lightest weight of electric locomotive used on electrified section of steam railroads shown by evidence is 100 tons, and the heaviest weigh as much as 288 tons.

(b) The respondent has, within the past five years, used steam locomotives then owned by it for hauling revenue freight.

2. Merchandise Despatch Cars.

(a) Respondent uses a baggage type of passenger car in transporting its less than carload merchandise despatch freight. Most of these cars are equipped with motors. Some are trailers. The longest car is 50' 5". The widest is 9' 5½". The baggage type cars which are wider than 9 feet are not used in the operation into the cities of Chicago and Milwaukee, as a car greater than 9 feet in width cannot operate on the tracks used by the respondent in either of these cities. The capacity of these cars is from 20,000 to 35,000 pounds.

The average capacity of steam railroad freight cars is about 80,000 pounds. The maximum capacity is as high as 145,000 pounds.

(b) Respondent also owns and uses refrigerator cars, similar to the motor merchandise despatch cars.

**3. Freight Equipment.**

(a) Respondent owns 206 freight cars. Of that number 71 are dump cars, 2 are tank cars used for week killing, 2 are refrigerator cars equipped with electric refrigeration not used to carry freight. The dump cars are occasionally used in commercial service for hauling sand, gravel and stone where necessary to dump such material along the side of the track or off trestles. Respondent owns 114 freight cars which can be interchanged with steam railroads. The other freight cars are too light in construction to be accepted by steam railroads.

The Chicago, Milwaukee, St. Paul and Pacific Railroad owns an average of 6.29 freight cars per mile of road. The Chicago and Northwestern owns an average of 8.05 freight cars per mile of road. The Minneapolis, St. Paul and Sault Ste. Marie owns an average of 5.06 freight cars per mile of road. Class I steam railroads in the United States own an average of 9.7 freight cars per mile of road. The North Shore owns an average of 1.49 freight cars per mile of road.

(b) One hundred and fourteen of respondent's revenue freight cars are interchangeable with steam railroads. These cars have no electrical equipment and are exactly the same as steam railroad freight cars,

being identical in equipment, brakes, safety appliances, automatic couplers, and other devices.

(c) Respondent's freight cars have capacities of from 80,000 to 100,000 pounds each. It operates 36 gondolas with capacities of 100,000 pounds each; 52 gondolas with capacities of 80,000 pounds each, and its flat cars will carry maximum loads up to 80,000 pounds each. Eight of the respondent's 10 box cars will load 60,000 pounds each and the remaining two have a capacity of 45,000 pounds each.

**4. Passenger Equipment.**

(a) Respondent's passenger equipment consists of 182 units, of which 150 are equipped with motors and 32 are operated as trailers. This equipment includes nine dining cars and five observation-parlor cars.

(b) Respondent's passenger equipment is not interchangeable with steam railroads because of appurtenances for electrical operation and certain departures from the Master Car Builders' standards.

(c) Of respondent's 162 passenger cars, 90 weigh 100,000 pounds or more, and only nine weigh less than 75,000 pounds.

(d) Four of respondent's observation-parlor cars will seat 31 passengers each, and the fifth will seat 16 passengers. Its ordinary passenger cars will seat 30 passengers each.

(e) Most of the passenger and baggage car equipment is motorized. A few passenger cars have control

apparatus without motors so that they may be placed ahead of motor cars in trains. The widest passenger car used by respondent is 9 feet. The longest car is 56' ¾". The narrowest of steam railroad cars shown of record is 10 feet in width and the shortest in length is 72' 7½". The passenger equipment of respondent has 4-wheel trucks. The passenger equipment of steam railroads in general use have 6-wheel trucks. The curvatures on the lines of respondent are too sharp to permit the operation of cars with 6-wheel trucks. Radial draw bars are used on respondent's cars to permit trains to operate around short curves. More than 40 passenger cars of respondent are street cars which are used exclusively in street car operation.

**5. Ferry Truck or Container Cars.**

(a) The respondent's equipment includes a number of "ferry truck" or container cars, which are hauled from the shipper to the respondent's freight depots by tractors and then carried over respondent's line mounted two to a freight car.

(b) These ferry trucks or container cars are similar to those of the Chicago and Northwestern Railway and are used for the same purpose.

(7) PUBLICATION OF FREIGHT RATES AND PASSENGER FARES, ANALYSIS OF TRAFFIC HANDLED, AND METHOD OF OPERATION:

**1. Tariffs, Powers of Attorney, and Concurrences.**

(a) Respondent has on file with the Interstate Commerce Commission a total of 221 effective powers of attorney and concurrences issued by it. It publishes

16 local freight tariffs and participates as initial carrier in 206 freight tariffs, and as a delivering or intermediate carrier in more than 800 freight tariffs, thus providing freight rates in conjunction with steam railroads to and from practically every state in the United States, as well as to points in Canada and Mexico.

(b) Through railroad and pullman tickets are sold at respondent's stations to any part of the United States, Canada and Mexico.

(c) Published tariffs on file with the Interstate Commerce Commission permit the respondent to sell passenger tickets for trips around the world.

(d) Respondent publishes its freight and passenger tariffs through the same tariff publishing agents used by all steam railroads, and these agents publish many of respondent's rates for the steam roads and for respondent in the same joint tariffs.

(e) In assessing its local passenger fares, the respondent uses the same per mile basis as used by all steam railroads, namely, 3.6 cents per mile.

**2. Passenger Service.**

(a) Respondent operates about 40 fast through or limited passenger trains daily between downtown Chicago and downtown Milwaukee, there being 20 of these fast or through trains in each direction daily, in addition to the local and "commuter" trains. These limited trains operate over the Skokie Valley Line, with five cars each, drawn by self-propelled units. The running time of these fast trains is one hour and forty-five

minutes, equalling the fastest trains of the Chicago and Northwestern Railway Company, which operates 15 through trains daily between Chicago and Milwaukee.

(b) The respondent and the Chicago and Northwestern Railway are in direct competition with each other in their through or fast passenger service, their limited service to Waukegan, and their suburban and "commuter" service.

(c) In connection with its passenger service, the respondent operates nine dining cars having seating capacities of 22 to 24 persons per car. These dining cars are used in the through Chicago-Milwaukee morning, noon and evening trains, and were included as part of respondent's service to compete in passenger service with the Chicago and Northwestern Railway and the Chicago, Milwaukee, St. Paul and Pacific Railroad between Chicago and Milwaukee.

(d) In addition to its Chicago-Milwaukee limited and local service, the respondent operates a fast or limited service from Chicago to Waukegan on its "Shore Line" with stops only at the main stations, and the local service between the same points.

(e) A fast and local service, totalling 16 trains daily is maintained on the Libertyville Branch from Mundelein to Lake Bluff, where connection is made with the "Shore Line" trains.

(f) Respondent publishes in its train time schedules connections with the trains of all steam lines, motor bus and electric lines at both Chicago and Milwaukee, including all the transcontinental roads, both east and west.

(g) The fast passenger trains of the respondent running from Milwaukee make convenient connections in Chicago with the Stout Air Lines operating to Detroit, Cleveland, and other eastern cities; also with the Universal Air Lines System to St. Louis and Kansas City; and with the Embry-Riddle Company to Indianapolis and Cincinnati.

(h) Respondent's passenger service is rendered under regulations and fares filed with and subject to the jurisdiction of the Interstate Commerce Commission.

(i) In Milwaukee and Waukegan street car service is furnished by the respondent, this service being separate and distant from its other passenger service. Different equipment is used and special state tariffs applied to the local fares charged.

(j) Passengers boarding a limited train without a ticket and paying cash fares are given receipts similar to those used by steam railroads, and if a train is boarded at an agency station, but without a ticket, the passenger is assessed an extra or "penalty" fare, as steam railroads do in such circumstances.

(k) The passenger service of the respondent is performed in comparatively small train units ranging from a single car to 4 or 5 cars per train. There are no single car trains operated by either of the paralleling steam railroads, the Chicago and Northwestern or the Chicago, Milwaukee, St. Paul and Pacific. Respondent operates 40 passenger trains daily between Chicago and Milwaukee. A substantial part of the main lines passenger service of respondent is performed over tracks laid in city streets. The main line trains of the re-

spondent into and out of Chicago run over the elevated structure of the Chicago Rapid Transit Company. The speed of trains of respondent is rigidly restricted at many places by state, city and village authority. Arbitrary stops are also required by such authority.

Respondent has inter-line ticket arrangements with steam railroads. In September, 1930, less than 4 per cent. of the total passenger revenue was derived from inter-line passenger business and the remaining 96 per cent. from passenger business local to respondent's line.

**3. Merchandise Despatch Service.**

The merchandise despatch service is performed by respondent in baggage type cars, most of which are motorized. This service is handled in trains consisting of one or two cars with a total maximum of 5 cars to the train. Respondent maintains several off-line freight stations within Chicago, at which shippers may deliver merchandise freight. The freight from these stations is transported to the rail station in specially built motor trucks. This is called the ferry truck service. *The revenue derived from the merchandise despatch service exceeds the revenue derived from all carload freight handled in freight equipment which is interchanged with steam railroads. More than 10 per cent.* of the total tons of freight handled by respondent is the merchandise despatch or less than carload freight.

**4. Carload Freight Service.**

(a) It is impossible for respondent to handle carload freight in standard railroad freight equipment on 31.47 route miles of track. This is 22.73 per cent. of

the total route mileage of respondent. Such impossibility is due to clearance conditions and franchise restrictions. Respondent has no interchange track with any steam railroad at Milwaukee or at Chicago, its two principal terminals. The nearest interchange track to Milwaukee with a steam railroad is at Racine, Wisconsin, about 20 miles distant. No freight cars containing less than carload freight are interchanged with steam railroads. Respondent has no reciprocal switching arrangement with a steam railroad at either Chicago or Milwaukee, or at any point except Racine, where it has switching arangement with one steam railroad.

(b) In 1930 the respondent *handled approximately 27,000 carloads of freight traffic*, 23,000 or 87 per cent. of which were interchanged with connecting steam railroads.

(c) During the month of September, 1930, carload freight traffic was handled by the respondent in cars interchanged with 69 different steam railroads and 31 different private car companies.

**5. Methods of Operation.**

(a) The respondent operates its trains under train rules substantially similar to the Standard Code of Train Rules of the American Railway Association. Its trains are operated under train orders, clearance cards, "meet" orders, changes in orders, rules as to superior and inferior trains, and in many other details as are trains of steam roads. Respondent's train despatching is done by telephone.

(b) Respondent serves industries directly from its line and industrial tracks. These industries receive and load solid cars from and to distant break-bulk points, which are picked up and given line-haul service. The incoming or "interline" freight and distant points comes in by steam railroad connections of the respondent and is distributed by respondent.

(c) Respondent's methods of business solicitation, its membership in tariff organizations, and in tariffs published and concurred in, are national and international in scope.

(d) Respondent's bills of lading, way-bills, and inter-line way-bills are the same as those used on steam railroads generally.

(e) Respondent is an associate member of the American Railway Association, a member of the Western Passenger Association, a member of the Bureau for the Safe Transportation of Explosives, and a member of the Western Weighing and Inspection Bureau. These are all regular steam railroad organizations.

(f) Respondent is a subscriber to the Code of Car Service Rules, the Code of Per Diem Rules, the Car Service and Per Diem Rules Agreement of the American Railway Association, the Master Car Builders' Rules, the Interchange Agreement of the American Railway Association, the Official List of Open and Prepay Stations, and the Consolidated Freight Classifications, all being rules entered into and promulgated for steam railroads generally.

(g) The track and roadbed of the respondent is maintained by section gangs, the foremen of which are housed in respondent's specially constructed building. The respondent maintains roadway maintenance equipment, consisting of gang or track inspection cars, hand cars, derrick cars, etc.

**6. Traffic and Revenue.**

(a) The passenger fares of the respondent are regulated by and are subject to the jurisdiction of the Interstate Commerce Commission.

(b) For the year 1930, the total freight and express revenues of the respondent were $1,384,547.58.

(c) The classification of commodities prescribed by the Interstate Commerce Commission for compiling freight statistics for steam railroads includes 157 commodities. During the years 1929 and 1930 the respondent did not handle 56 of these commodities. The steam railroads in the same territory handled substantially all of these commodities. Respondent handled practically no livestock, no grain, packing house products, poultry or eggs. Respondent has no grain elevators or stock yards on its lines.

Respondent derives 78 per cent. of its total revenue from passenger service. Class I steam railroads for the United States derive about 14.7 per cent. of their total revenues from passenger service. Respondent derives 22 per cent. of its total revenue from freight service, of which the greater part is derived from merchandise despatch service performed in the baggage type cars. Class I steam railroads derive 76.6 per cent. of their

revenue from freight traffic. Respondent derives 8.47 per cent. of its total revenues from the transportation of interline freight. Class I steam railroads derived more than 85.14 per cent. of their total revenues from the transportation of interline freight in 1928.

**7. Corporate Organization.**

The respondent has a corporate set-up similar to steam railroads, having a departmental arrangement consisting of an Executive Department, Operating Department, Traffic Department, Law Department, and Medical Department.

Respondent publishes tariffs by which it maintains through routes and joint rates with steam railroads. The law and tariff regulations of the Interstate Commerce Commission require the publication and filing of tariffs by all common carriers by railroad subject to the Interstate Commerce Act.

Exhibits and evidence of record which correctly portray the facts show that 112 electric railways filed tariffs with the Interstate Commerce Commission, which published freight rates applicable locally to those railroads, and that of these railroads 64 participated jointly with steam railroads in interline tariff and 42 participated jointly in interline tariffs with other electric railroads during the year 1919. The Spokane Inland Empire R. R. Company, an electric line, maintained tariffs in 1911 in which it participated generally in interline freight traffic with steam railroads between points throughout the United States. The Southwest Missouri Railroad Company during the years 1927 and 1928 par-

ticipated generally in interline freight traffic with steam railroads by means of published tariffs.

Respondent operates through a number of cities and towns under rights granted by franchises or ordinances. These restrictions, prohibitions and obligations are many and varied. In all but 2 of 14 towns through which respondent operates under franchises the operation must be by electricity. In all but 3 such towns steam operation is prohibited. In 5 safety stops are required. In 8 respondent must pave the streets between its tracks. In 7 respondent must stop at street intersection. In 9 respondent must light streets and crossings. In 4 respondent must remove snow. In 2 respondent must sprinkle the streets. In 6 freight operation is prohibited. In 5 respondent must carry policemen and firemen free of charge.

Respondent is required to pay a license fee to the city of Chicago of $50.00 annually for the operation of each car over the elevated structure of the Chicago Rapid Transit Company in Chicago, and to keep this license posted within the car. Respondent may under an ordinance recently enacted by the city council of Chicago and adopted by the people in a referendum vote, operate its trains in the new intra city subway transportation to be constructed within the city of Chicago.

Since July, 1916, when the Chicago North Shore & Milwaukee Railroad, the immediate predecessor of respondent, acquired the properties, the respondent and predecessors have issued securities aggregating $71,327,200 par value. Of that total $9,664,600 were issued by the predecessor company prior to March 1, 1920,

and the remainder have been issued since that date. All of these securities were issued upon the authority and with the approval of the regulating commissions of Illinois and Wisconsin. There were outstanding in the hands of the public as of April 30, 1931 a total of $42,935,608.07 par value of securities issued by respondent and its predecessors. Of that amount $4,000,000 in securities were issued prior to March 1, 1920, and $38,935,608.07 were issued since that date. There is in the treasury of respondent or pledged under the First and Refunding Mortgages a total of $9,291,800 par value of securities. In December, 1920, $2,500,000 par value of securities were issued by respondent upon the authority and with the approval of the regulating commissions of Illinois and Wisconsin. All securities issued by respondent since March 1, 1920, have been reported to the Interstate Commerce Commission in the annual report of respondent filed with that Commission. This report requires to be shown, and the respondent has shown, that the securities therein reported were issued under the authority and with the approval of the regulating commissions of Illinois and Wisconsin.

Since March 1, 1920, more than $239,000,000 par value of securities have been issued by electric railroads reporting to the Interstate Commerce Commission other than respondent without the approval or authority of the Interstate Commerce Commission.

The Interstate Commerce Commission has prescribed a uniform system of accounts for electric railways, which governs the accounting system of respondent. That Commission prescribes a different and more com-

prehensive classification of accounts for use by steam railroads. In March, 1913, Congress enacted the valuation act, Section 19a of the Interstate Commerce Act, 37 Stat. L., 701, which requires the Commission to ascertain and report the value of all property owned or used by every common carrier subject to the provisions of the act. The property of the respondent has not been valued by the Commission. The Commission has not reported the value of any independently operated electric railroad. The Commission has made tentative valuations or final valuations, of the property of all steam railroads, subject to the Interstate Commerce Act.

Respondent operates an electric railroad which is engaged in transporting state and interstate commerce between the urban communities of Chicago, Illinois, and Milwaukee, Wisconsin, and intermediate points in Wisconsin and Illinois. Respondent is not owned or controlled by any steam railroad system of transportation. It is not operated as a part of any steam railroad system of transportation. Respondent performs a street car service, a suburban service and an interurban service.

Since its organization respondent has been given the status of an interurban electric railway by official acts of construction by the Railroad Commission of Wisconsin, the state regulating body of Wisconsin, and by the Illinois Commerce Commission, the state regulatory body of Illinois. Each of these tribunals has assumed jurisdiction over the securities issued by respondent, of which fact the Interstate Commerce Commission has been apprised in the annual reports of the respondent

to that Commission. The Interstate Commerce Commission, by its failure to act, and by affirmative recommendations in its annual reports to the Congress of the United States, has given to respondent by contemporaneous construction the status of an interurban electric railway. In its 35th annual report to Congress for the year 1921 the Commission made the following recommendation:

> "We have no jurisdiction over the issuance of securities of a 'street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation.' Certain electric railways independently operated are engaged in the general transportation of freight in interstate commerce in addition to the transportation of passengers. The use of electricity as motive power for railways is rapidly increasing. Some electric lines correspond substantially to steam roads in all important particulars except that of motive power. Under Section 15a of the act we are given authority to include in groups of carriers for rate making purposes such interurban electric lines as are engaged in the general transportation of freight. It seems desirable that Section 20a of the Interstate Commerce Act be so amended as to indicate definitely the classes of electric railway companies subject to that section."

The Interstate Commerce Commission repeated that recommendation in its annual reports to Congress for the years 1922 to 1925, inclusive. In its annual report to Congress for the year 1929 the Commission made the following comments and recommendations:

"In our annual reports to the Congress for various years since the enactment of the amendments of 1920, we have recommended that Section 20a, relating to the issuance of securities, be so amended as to apply to electric railway companies engaged in the general transportation of freight. Experience in the administration of the act, as well as changes in the conditions affecting electric railway companies, seem to require that consideration be given to the general subject of the application of various sections of the statute to those companies."

Those recommendations were repeated by the Commission in its annual reports to Congress for the years 1929 and 1930.

Respondent has been informed by letter on two occasions since the year 1929 by certain officials of the Interstate Commerce Commission that unless it were advised to the contrary it need not file returns in response to certain orders made by the Commission designed to determine the recapturable income from railroads subject to Section 15a of the Interstate Commerce Act.

The court finds that the various photographs, charts, exhibits and diagrams introduced in evidence by plaintiff and respondent correctly portray the facts which they are intended to show.

The foregoing findings of fact are based upon the legal and competent evidence produced upon the trial rejecting all improper, irrelevant and incompetent parts thereof.

## CONCLUSIONS OF LAW

The Court, upon the foregoing findings of fact, states the following as its conclusions of law:

1. The letter, as well as the spirit of the Interstate Commerce Act as amended by Transportation Act, 1920, clearly excludes from Section 20a of the Interstate Commerce Act, and from other sections thereof, independently operated electric railways. Congress there and elsewhere in the act described these railways as street, suburban and interurban electric railways not operated as a part of a general steam railroad system of transportation, and by doing so it adopted a descriptive term which had the sanction of time and common usage. Congress used substantially the same description in the Federal Control act, the Electric Railway Mail Pay act and in various sections of the Transportation act, 1920, and the Interstate Commerce act. The Supreme Court used the term "interurban electric railway" in *Omaha and Council Bluffs Street Ry. Company* v. *I. C. C.*, 230 U. S., 324, and in *Spokane & Inland Empire R. R. Co.* v. *U. S.*, 241 U. S., 344. Among the common characteristics of interurban electric railways, subject to the jurisdiction of the Interstate Commerce Commission unless specifically excluded by the language of certain sections of the Interstate Commerce act, are that they use electric power in the transportation of passengers or freight or both in intrastate and interstate commerce, occupy city streets and highways in addition to private rights of way, stop cars or trains at street intersections and country highways for the reception and discharge of passengers, maintain loading platforms and shelter sheds, without agents, for

passengers, have short radius curves and operate part of their system under municipal and village franchise authority and restrictions. Respondent has all of these characteristics.

2. The Court finds that the respondent is now, and has at all times since its organization been an interurban electric railway which is not operated as a part of a general steam railroad system of transportation, and that respondent is not now, and at no time since its organization has it been, a "carrier" or "corporation" within the meaning of those terms as defined in Section 20a of the Interstate Commerce act, and is therefore excluded from the provisions of Section 20a of that act.

3. The Court finds that the petition should be dismissed.

BY THE COURT.

(Signed) CHARLES E. WOODWARD,
*United States District Judge,*
*Northern District of Illinois.*

IN THE

# District Court of the United States

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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IN EQUITY
No. 10067

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UNITED STATES OF AMERICA, PETITIONER,

*v.*

CHICAGO, NORTH SHORE AND MILWAUKEE RAILROAD COMPANY, RESPONDENT.

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## FINAL DECREE, MARCH, 1932

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This cause came on to be heard upon final hearing for a permanent injunction upon the pleadings and evidence and was argued by counsel, and thereupon and upon consideration thereof, it is Ordered, Adjudged and Decreed,

That the petition be, and the same hereby is dismissed for want of equity.

Dated this 24th day of March, A. D. 1932.

(Signed) CHARLES E. WOODWARD,
*United States District Judge,*
*Northern District of Illinois.*

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No. 664

# In the Supreme Court of the United States

OCTOBER TERM, 1931

PIEDMONT & NORTHERN RAILWAY COMPANY,
PETITIONER

*v.*

INTERSTATE COMMERCE COMMISSION, SOUTHERN RAILWAY COMPANY, ET AL., RESPONDENTS

## MEMORANDUM OF INTERSTATE COMMERCE COMMISSION IN RE PETITION FOR WRIT OF CERTIORARI

NELSON THOMAS,
*For Interstate Commerce Commission.*

DANIEL W. KNOWLTON,
*Of Counsel.*

FEBRUARY, 1932.

# In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 664

PIEDMONT & NORTHERN RAILWAY COMPANY, petitioner

*v.*

INTERSTATE COMMERCE COMMISSION, SOUTHERN Railway Company, et al., respondents

## MEMORANDUM OF INTERSTATE COMMERCE COMMISSION IN RE PETITION FOR WRIT OF CERTIORARI

The Interstate Commerce Commission does not oppose the application of the petitioner for writ of certiorari. The issuance of the writ as prayed would result in the speedy and final determination of the questions involved in the case, and such disposition is desired by the Commission.

In taking the position above stated, however, the Commission does not in any way concur in, assent or agree to, the allegations of fact or conclusions of law contained in the petition for certiorari, or in the brief and argument filed in support thereof.

NELSON THOMAS,
*For Interstate Commerce Commission.*

DANIEL W. KNOWLTON,
*Of Counsel.*

FEBRUARY, 1932.

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No. 664

# In the Supreme Court of the United States

OCTOBER TERM, 1931

PIEDMONT & NORTHERN RAILWAY COMPANY,
PETITIONER

*v.*

INTERSTATE COMMERCE COMMISSION, SOUTHERN RAILWAY COMPANY ET AL., RESPONDENTS

## BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

NELSON THOMAS,
*For Interstate Commerce Commission.*

DANIEL W. KNOWLTON,
*Chief Counsel,*
*Of Counsel.*

APRIL, 1932.

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# In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 664

PIEDMONT & NORTHERN RAILWAY COMPANY, petitioner

*v.*

INTERSTATE COMMERCE COMMISSION, SOUTHERN Railway Company et al., respondents

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT*

## BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

### DECISIONS OF THE COURTS BELOW

On May 23, 1931, the United States District Court for the Western District of South Carolina, Honorable J. Lyles Glenn, Judge, handed down an opinion, supported by special and general findings of fact and conclusions of law awarding an injunction as prayed in a case wherein the Interstate Commerce Commission and five railroads were

plaintiffs and the Piedmont & Northern Railway Company was defendant. In a decree duly entered under date of June 9, 1931, pursuant to the aforesaid opinion, the defendant was forbidden to extend its lines of railroad by constructing certain new mileage except under certificate of public convenience and necessity duly issued by the Interstate Commerce Commission. The decision of the District Court is reported in 51 F. (2d) 766.

The Piedmont & Northern perfected its appeal to the United States Circuit Court of Appeals, Fourth Circuit, from which court, and before hearing therein, the case has been removed to this Court by writ of certiorari.

The facts, as well as the law involved in this case, have previously been considered by a three-judge court convened pursuant to the Urgent Deficiencies Act (38 Stat. 219, U. S. C. 28, Sec. 47) in the case of *Piedmont & Northern Railway Company* v. *United States,* 30 F. (2d) 421. Upon appeal to this Court the decree of the three-judge court was reversed upon the ground that the Court should have dismissed the bill for lack of jurisdiction instead of upon the merits. (280 U. S. 469.)

## QUESTIONS PRESENTED

The primary question presented for determination is whether the Piedmont & Northern may lawfully extend its lines without securing from the Interstate Commerce Commission a certificate of convenience and necessity as provided for in the

Interstate Commerce Act as amended, Section 1 (18), (19), and (20). This involves a secondary question whether the Piedmont & Northern comes within the exception stated in paragraph (22) of the aforesaid section of the Act, providing that the Commission shall have no authority over extensions of—

> street, suburban, or interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation.

## STATUTES

The following are the statutory provisions of the Interstate Commerce Act directly involved in this case:

Section 1:

> (18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by

railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such rights or

privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph 18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this Act, party to such proceeding, to provide itself with safe and adequate

facilities for performing as a common carrier its car service as that term is used in this Act, and to extend its line or lines: *Provided,* That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this Act which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

## STATEMENT

This is an appeal from a decree of injunction against the Piedmont & Northern Railway Company, petitioner herein, to prevent the construction

of threatened extensions of its railway lines without first securing from the Interstate Commerce Commission a certificate of public convenience and necessity. The suit below was instituted by the Interstate Commerce Commission in April, 1930, under authority stated in paragraph (20) of Section 1 of the Interstate Commerce Act, which provides that construction or abandonment contrary to the terms of the statute may be enjoined at the suit of the United States, the Commission, or any party in interest. As parties in interest, several steam railroads, operating in the same territory with the existing Piedmont & Northern lines and through which the proposed lines would run, were permitted by the Court to intervene and join with the Commission as parties plaintiff.

Petitioner, for nearly 20 years previous to the institution of this suit in the lower Court, has owned and operated continuously two separate sections of electrically powered railroad located in North and South Carolina. The South Carolina section extends from Greenwood to Spartanburg, with an extension from Belton to Anderson, a total mileage in South Carolina of 101 miles. The North Carolina section extends from Gastonia to Charlotte, with an extension from Belmont Junction to Belmont, a total mileage in North Carolina of about 27 miles. The total mileage in both states is about 128 miles. (R. 183, 404.) The road connects with other railroads and is engaged in interstate trans-

portation, the larger portion of which is freight, as a participating carrier in through routes and joint rates under duly published tariffs.

On March 26, 1927, the petitioner filed an application with the Commission, under paragraphs (18) to (21) of Section 1 of the Act, for a certificate of public convenience and necessity requiring and permitting it to construct a line of railroad using electricity as a motive power (denominated by the petitioner in the application as "an interurban electric railway") between Spartanburg, S. C., and Gastonia, N. C., and a similar line from Charlotte, N. C., in a northeasterly direction to Winston-Salem, N. C. This application was designated by the Commission as Finance Docket No. 6208, *Proposed Construction of Lines by Piedmont & Northern Railway Company,* reported 138 I. C. C. 363.

In said proceeding the applicant (the petitioner in this case) contended that the Commission should (under authority of *Texas & Pacific R. Co.* v. *Gulf, etc. Ry.*, 270 U. S. 266) declare that it had no jurisdiction over the proposed extensions for the reasons, first, that the proposed extensions were not covered by the provision referred to because they had been "undertaken" prior to May 29, 1920, *"which was 90 days after"* paragraph (18), supra, took effect; and second, that the applicant operated, and proposed to construct extensions of, an electric interurban railway such as paragraph (22) of Section 1 of the Act expressly exempted from the con-

trol of the Commission. The Commission overruled both contentions and, holding upon the merits that the public convenience and necessity did not require or justify the proposed extensions, denied the application. (R. 6, 138 I. C. C. 363.)

The lines of the petitioner extended as proposed would have been about 256 miles in length and would have extended continuously from Greenwood, S. C., to Winston-Salem, N. C. (R. 8, 424.)

On May 22, 1928, the Piedmont & Northern brought suit in the United States District Court for the Western District of South Carolina against the United States, under the Urgent Deficiencies Act (38 Stat. 219), alleging that the Commission was without authority over the proposed construction for the reasons above set out as stated in the original application to the Commission, and praying that the order of the Commission in taking jurisdiction of the same and denying same upon the merits be set aside and annulled. The Commission and certain interested railroad companies intervened and were made parties defendant. The case was submitted to a three-judge court, consisting of Circuit Judges Wadill and Northcott, and District Judge Soper, upon the record made before the Commission. The opinion rendered by Judge Soper, and concurred in by both the other judges, held that the proposed construction was within the jurisdiction of the Commission and that there appeared to be no legal ground for questioning the

correctness of the Commission's decision. (30 F. (2d) 421.) Upon appeal by the Piedmont & Northern to this Court, it was held that the order of the Commission denying the application was negative in character and therefore not within the class of Commission orders subject to attack under the Urgent Deficiencies Act. The Court therefore reversed the lower Court and remanded the case to the District Court with instructions to dismiss for want of jurisdiction. (280 U. S. 469.)

After the denial by the Commission of the petitioner's application for a certificate of convenience and necessity and its failure in the District Court and this Court to have the action of the Commission changed, the company, on March 10, 1930, at a duly convened meeting of its board of directors, passed a resolution directing its officers to proceed toward the completion of the lines of railroad as originally planned, by beginning immediately the construction of a line of railroad between Spartanburg and Gastonia to connect together the existing sections of the railroad. At the same meeting it was resolved that the plan to complete the lines of the company as the same were originally projected (from Greenwood, S. C., to Durham, N. C., Winston-Salem, N. C., and various other points) was not abandoned, but was then reaffirmed and approved. (R. 123, 438.) Copies of these resolutions were forwarded to the Interstate Commerce Commission and a small amount of

grading was done between Spartanburg and Gastonia. (R. 424.)

Petitioner having thus indicated its purpose and intention to proceed with the construction without a certificate of public convenience and necessity from the Commission, the Commission, under paragraph (20) of Section 1 of the Interstate Commerce Act, brought this suit to enjoin the illegal construction.

At the trial of the case in the District Court, both the plaintiffs and the defendant introduced voluminous evidence, the substance of which is quite fully summarized by the Court in its "Special Findings of Facts." (R. 402, 433.) In its Assignment of Errors the petitioner makes complaint that the Court *failed* to make certain detailed findings with respect to electrical equipment and manner of operation and to point out that certain features were not found in ordinary steam railroads, but does not question the correctness of the facts found. (R. 494–500.) The Court's Special Findings of Fact may, therefore, for the purposes of this appeal, be taken as supported by the evidence. Said findings will, in many instances, be referred to herein as authority for our statements relative to characteristics of the road in question.

From the evidence the Court concluded that the petitioner had threatened, and was about, to construct an extension of its line of railroad without a certificate from the Commission and in violation

of paragraph (18) of Section 1 of the Interstate Commerce Act as amended, and that the respondents (plaintiffs) were, under paragraph (20) of said section, entitled to prevent by injunction the construction of said extension unless the petitioner should first secure a certificate of convenience and necessity from the Commission. The Court further found that the petitioner's existing lines were not, and that its proposed lines if constructed would not be, interurban electric railways within the meaning of the exception contained in paragraph (22) of said section. Finally, the Court found that the respondents were entitled as a matter of law to the injunction prayed.

## SUMMARY OF ARGUMENT

1. The Piedmont & Northern, whose major operations are identical with those of the steam roads, whose revenues are 94 per cent derived from freight, whose said freight is mostly carload traffic, mostly interchanged with the steam roads and mostly moving interstate, is not rendered an interurban electric railway within the meaning of the clause, which excludes street, suburban, or interurban electric railways not operated as part of a general steam system from Commission authority over the construction of new lines of railroad, merely because its motive power is electricity, because it operates between cities and because a very minor part of its service has characteristics peculiar to local electric railways.

2. The words "interurban electric railway" have no settled meaning at law, and they are not defined in the Act. In determining whether particular construction falls within the class excepted from Commission authority, the surest guide is furnished by the context and by the relation of the specific provisions to the railroad policy introduced by Transportation Act, 1920. Compare *Texas & Pacific Ry.* v. *Gulf, etc., Ry.*, 270 U. S. 266.

3. Under the terms of Section 15a the Commission must include the Piedmont & Northern with the steam roads when adjusting rates so as to yield a fair return on aggregate group property value, and Section 15a and paragraphs (18)–(22) of Section 1, herein involved, are among the interrelated amendments added by the Transportation Act, 1920, with the one objective of promoting a generally effective transportation service at just and reasonable rates, and the latter provisions, namely, those placing restrictions upon competitive and unneeded new construction, are particularly essential to the plan in order that the aggregate property value upon which rates paid by the public are to be based shall not be enlarged beyond the general transportation needs, and that the financial stability of established systems of transportation shall not be endangered.

4. While the fact that the electric interurbans excepted from the Commission's Section 15a authority to make group adjustment of rates are lim-

ited to those not engaged in general transportation of freight shows that uniformity of freight rates was regarded to be in all cases essential, the fact that the electric interurbans excepted from the Commission's authority over new construction and over the issuance of new securities are not so limited does not show that all railroads operating between cities with electric locomotives, whatsoever their character and purpose, are to be quit of the Commission's said authority, but merely demonstrates that Congress desired to leave those matters to local authority, if such railroads are principally designed for the usual local electric railway purposes, even though to some extent intended for general freight transportation; to give the difference in language a broader scope than this would frustrate the plan of Congress in essential particulars and would be contrary to the rule that excepting clauses should be narrowly construed so as not to destroy the remedial processes intended to be accomplished.

5. The "dovetail" relationship of the provisions comprising the plan of Congress for an effective and coordinated general transportation system refutes the Piedmont & Northern's position that it is permissible thereunder for it to avail itself of certain provisions, enabling it to become an important link with the steam roads in the general transportation chain, while at the same time refusing to submit itself to the restrictive provisions,

essential to the good of the transportation system as a whole.

6. Appellant's reasoning to the effect that Congress, by using the words "interurban electric railway" in the exception to Commission authority over the construction of new lines, showed an intention to exclude all electric railroads operating between cities from the national field of authority because railroads constituting links in the national transportation chain were already employing electric locomotives when the 1920 Act was passed is to argue that Congress intended to permit any railroad to be quit of restraint in respect of extensions or new construction of lines if it used or adopted electric motive power.

## ARGUMENT

### I

**The Piedmont & Northern's proposed lines are not such as fall within the meaning of the exception contained in Section 1 (22), excluding from Commission authority the construction of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation**

Paragraph (18) of Section 1 provides that—

> no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad * * * unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience require or will require

the same. Paragraph (22) of Section 1 provides that the authority so conferred upon the Commission—

> shall not extend to the construction * * * of spur, industrial, team, switching or side tracks, located or to be located wholly within one state, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

The Piedmont & Northern, although contending that it is an interurban electric railway and as such not subject to the requirement of Section 1 (18) of the Act that Commission authority must be first obtained before extension of lines is undertaken, nevertheless admits that it is a common carrier by railroad, and, in most respects, subject to the Act. (R. 2–3 and 59–60.) Except for a few features affecting a minor part of its operations, which will later be described, it is in fact just as much an ordinary railroad as if it had heretofore been operating by steam power in interstate commerce and had only now decided to operate with electric power.

The Piedmont & Northern was incorporated by act of the South Carolina legislature as an ordinary railroad company having full powers of eminent domain. (R. 403.) It has acquired and operated the lines hereinabove described, of which only a very small proportion of its main-line tracks were located in streets and highways, the line being generally carried around the larger towns and

cities instead of going through them. (R. 404.) It was promoted by a group of men, headed by the late James B. Duke, who were interested in the development of electric power in the Piedmont region of the Carolinas. This group was also interested in textile, tobacco, and other industries in the Piedmont regions of North and South Carolina. From its inception, the plan of the promoters was to divert freight traffic from existing steam railroads to the Piedmont & Northern and new interstate steam railroad connections. Pursuant to this plan the company, before it had constructed any of its lines, entered into a traffic agreement with the Seaboard Air Line Railway Company to create a new joint interstate traffic route in connection with that railroad. (R. 404–407.) Since it was admitted by petitioner at the hearing and is reiterated in its brief filed in the lower Court that the proposed new construction, if completed, would be similar in design and equipment and used in the same way as the petitioner's existing lines, the features of the construction and operation of the existing lines at and about the time of the institution of the present suit may be taken as representative of what the proposed lines would be. (See respondents' request for special findings of fact, paragraph IV, R. 113.)

Petitioner's lines are of standard gauge, standard railroad construction, modified only in the respects proper to the use of electricity as motive power. Outside the cities the lines are on private

rights of way, of the standard of single-track steam railroad construction. Only about 3 per cent of main-line mileage is in city streets. All tracks are capable of efficient handling of freight cars of the type used by railroads generally throughout the country. The maximum grade of the line is one per cent. Eighty-pound rails are used, and the line has been maintained in excellent condition. (The petitioner has stated that it intends to install 100-pound rails in the proposed new track, if built, and that in the proposed new construction separate through track would carry freight around the towns.) No differences in construction except those incident to the use of electricity instead of steam power distinguish the tracks of petitioner from those of steam railroads in the vicinity. (R. 411, 412.)

The petitioner owns 287 freight cars, all of which are interchanged freely with connecting steam railroads under the standard per diem arrangement, and which are identical with freight cars owned by the steam roads, in all respects, including brakes, safety appliances, automatic couplers and other devices. It also owns an office or business car of the standard type used by the officers of steam railroads. Trains of as many as 65 freight cars may be hauled by two of petitioner's electric locomotives controlled by one driver, and trains of 40 to 45 cars are quite usual. Petitioner's passenger cars are mostly self-propelled, though it has two

which, being without motors, must be used as trailers. (R. 412–413.)

The petitioner has operated through Pullman cars in connection with the Seaboard Air Line Railway Company, is a member of the Southeastern Passenger Association, publishes and sells passenger tickets to all parts of the United States in connection with the steam railroads. It sells tourist tickets to Norfolk, Washington, and northern points in connection with steam railroads and checks baggage on passenger tickets through to all destinations. It interchanges passengers on through interchange tickets, but with the exception of the through Pullmans above mentioned, it does not interchange any passenger cars with the connecting steam railroads. (R. 414.)

In its freight business the petitioner interchanges package freight in interstate through transportation, as well as loaded freight cars. It handles its freight business in the same manner as do the single-track steam railroads in the same territory, except as to incidental differences arising from the use of electric motive power instead of steam. It has an operating rule book similar in substance to the rule book of the Southern Railway Company, differing only in so far as would arise from the fact that the Southern has double-track operation with steam power and the petitioner has single-track operation with electric motive power. The petitioner's through and local freight trains are operated in substantially the same manner as similar

trains upon the steam railroads, moving under train orders, clearance cards, meet orders, rules as to superior and inferior trains, air brakes, hand brakes, and train connections. The petitioner's signal system is similar to that used by some of the steam railroads, although it is not of such high class as is generally used by the longer lines of steam railroads in the territory. Industries are served by the petitioner directly from its lines and industrial tracks in substantially the same manner as industries are served by the steam railroads in the vicinity. Distribution of incoming and outgoing freight and transfer thereof with connections of steam railroads is handled in substantially the same way as is such freight by the steam railroads. Regularly scheduled package freight cars are operated by the petitioner in connection with steam railroads to Atlanta, Baltimore, Birmingham, Boston, Charleston, and numerous other distant cities. This service is also in connection with ocean steamship lines. (R. 414, 415.)

The petitioner's solicitation of business, its membership in traffic organizations, the tariffs published and concurred in by it cover the whole of the United States. It maintains traffic managers and commercial agents not only at its home office, but also in Cincinnati and other distant cities. (R 415.)

The petitioner is a member of the American Railway Association, Railway Accounting Officers Association, Railway Treasury Officers Associa-

tion, Southern Association of Car Service Officers, Southern Claims Conference, The Traffic Club of New York, Association of Railway Executives, Southern Freight Association, Southern Weighing & Inspection Bureau, Southeastern Demurrage & Storage Bureau, the membership of which organizations is made up largely of the steam railroads and their officers. Officials of the company are members of the general committee and also the executive committee of the Southern Freight Association with the voting power equal to that of any interstate steam railroad member. (R. 416.)

The petitioner's express business is carried on under standard contract with the Railway Express Agency, Inc. It is a member of the Per Diem Agreement among the steam railroads governing the terms and conditions of interchange of freight cars.

The petitioner publishes 17 general individual tariffs under its own name and Interstate Commerce Commission serial numbers, and participates in numerous other published tariffs in which it is joined with steam railroads. These tariffs provide for through transportation over all parts of the United States from the Atlantic to the Pacific, and in some instances to Mexican and Canadian destinations. From a tariff standpoint the petitioner has the power by changes in its own tariffs to affect the rate structures of steam railroads all over the United States. Between 1916 and 1930 it has filed 303 proposals with the Southern Freight Associa-

tion for changes of through rates to and from points distributed throughout the country. (R. 415–416.)

The revenues of the petitioner are derived largely from its freight business, its passenger revenues, at one time substantial, having steadily decreased, and in 1929 amounted only to 2.9 per cent of the petitioner's total revenues. (R. 416–417.) A very large proportion of the petitioner's revenues from freight business is derived from interchange of freight with interstate steam railroads. In 1929 4.3 per cent of the petitioner's total freight revenues was derived from local freight and 95.7 per cent from interline exchange freight. On the other hand, the petitioner's passenger revenues are derived almost entirely from local traffic, the ratios for 1929 being 97.8 per cent local and 2.2 per cent interline traffic. (R. 417–418.)

The petitioner has, since 1916, been a class I railroad, enjoying operating revenues of more than a million dollars annually. In 1929, the petitioner's total revenue was $2,451,992.34, of which $2,317,528.77 was derived from freight. The petitioner's freight revenues come largely from interstate traffic as distinguished from intrastate. In 1929, interstate traffic produced 80.7 per cent of the petitioner's freight revenues and its intrastate traffic only 19.3 per cent. (R. 418.)

The effect of the traffic agreement between the Piedmont & Northern and the Seaboard Air Line hereinabove referred to appears in a comparison

of the amount of freight interchanged with that line and amount interchanged with other connecting steam lines. In 1927, out of a total of 71,643 carloads of freight interchanged with the petitioner's steam connections, 55,594 carloads were interchanged with the Seaboard. This was 77.6 per cent of the total. In 1928, the interchange with the Seaboard amounted to 78.5 per cent of the total, and in 1929, 76.5 per cent. The average interchange of carload freight between the petitioner and the connecting steam railroads is approximately 6,000 carloads per month. (R. 418–419.)

The beginning of the operation of the petitioner's existing lines resulted in the opening up of new joint through routes and the diversion of a very substantial amount of freight traffic from the steam railroads, which had been carrying the same, to the new routes in which the Seaboard Air Line participated. And, if the petitioner should construct the contemplated extensions, new and important joint through routes would be opened up between Florida and other southeast territories and the northern gateways. (R. 400–422.)

According to the Piedmont & Northern's estimate presented in connection with its application for certificate of convenience and necessity, the construction of the proposed extensions, thereby filling in the gap in petitioner's lines, would result in the diversion from existing steam railroads of 82,320 cars, not including 12,300 cars of bridge traffic carried through the length of its line as an in-

terior connecting link in new through routes. The revenue to be derived from this traffic taken from the steam railroads was estimated at nearly $4,000,000 for the first year, expected to increase progressively at the rate of 8.4 per cent for each year thereafter, reaching $5,822,344 in additional revenues for the sixth year. The intervening steam railroads contend that by reason of the fact that they would lose a longer haul on such diverted traffic than the petitioner would gain, their loss by reason of the proposed construction would be at least twice the amount of the revenue derived by the Piedmont & Northern. (R. 421–422.)

The Louisville & Nashville and the Atlantic Coast Line have recently leased the Clinchfield lines and the former company has constructed, practically to completion, under Commission certificate, a new cut-off line costing over five million dollars, which creates a new direct route to the territories involved. The building of the lines proposed by the petitioner would create a new through route directly competing with and diverting traffic from the route just established by the Louisville & Nashville and the Atlantic Coast Line and obviously diminish the revenues from such route below the figures presented to the Commission in support of the application for certificate. (R. 422.)

As bearing upon the practical results with respect to diversion of traffic and disturbance of existing traffic conditions, the evidence shows that the petitioner company is owned and controlled by the

Duke Endowment Trust. This organization is closely allied in ownership, control, and management with numerous other Duke interests which operate warehouses, factories, steam power plants, and various other mercantile and industrial enterprises in the Piedmont territory, and because of such common control, a great amount of freight movement will be diverted from existing steam carrier routes and handled over the new through routes established in connection with the petitioner's extended lines. (R. 422.)

The facts above set out, which are taken for the most part from the Special Findings of Fact made by the District Judge (and not questioned by the petitioner in its Assignment of Errors), show conclusively that in all respects essential to the proper application of the construction and abandonment provisions of the statute to a particular case, the Piedmont & Northern has the characteristics of the usual steam powered railroad.

In *Kirkpatrick* v. *Piedmont Traction Co.*, 170 N. C. 477, there was involved a suit by an abutting property owner against the Piedmont Traction Company (predecessor in ownership of the North Carolina segment of appellant's line) to recover damages for the laying of track and its operation on the highway adjacent to his property on the theory that it constituted an additional burden on the fee. It appears from the decision that the usual street railway does not, under the laws of North Carolina, subject adjacent property to an

additional servitude. The court held that the Piedmont & Northern's operations were of such character that they did constitute an additional servitude, remarking as follows:

> We are of opinion that, from the nature and description of the defendant's business as given in the record, and the manner in which it operates its freight trains and interurban passenger trains, it should be classed as a "steam railway" and can not be regarded as the ordinary street railway. The matter is not to be determined by the character of the motive power, but rather by the character of the business done, as well as the injury inflicted by it.

True the petitioner's operations are interurban in the sense of being conducted between cities. Similarly, if the word "interurban" carries with it no other meaning than "between cities," the operations of the great trunk lines of the country are likewise interurban, which would compel the strained construction that Congress, in excluding interurban electric railway from Commission authority with respect to new construction, intended that the distinction between them and the steam roads should depend solely upon the character of the motive power. This can hardly have been Congress's intention. The obvious intention is shown not only by the association of the term "interurban" electric railway with street and suburban electric railways, but also by the very fact that the whole of paragraph (22), wherein it is contained,

constitutes an exception from Federal authority in favor of local authority. That intention is that the term should signify railways whose operations are distinctively local and having no substantial effect upon the steam railroads in the vicinity. Measured by such standard the Piedmont & Northern's operations fall far outside the scope of the term "interurban electric railway."

The opinion of the three-judge court (30 F. (2d) 421) contains a comprehensive statement of the local operations upon which the Piedmont & Northern relied in the prior case to distinguish it from the ordinary steam road. The evidence in the case at bar demonstrates the continuance of the conditions down to the end of March, 1930. (R. 183–214.) From said opinion the following excerpts are taken:

> The existing lines of the Piedmont and Northern have connections with the street railway systems of the cities which it serves, acquired either by direct ownership or by contracts for trackage rights. Thereby its passenger cars within the cities en route become street railway facilities. Between the cities there are frequent stops for passengers at an average distance of 1.2 miles apart—that is to say, 106 stops in 128 miles of road. Forty-nine passenger trains daily traverse various parts of the line. There are more daily trains and more frequent stops than on the corresponding mileage of the Southern Railway. Furthermore the spacing between

the trains is more uniform. The passenger cars are motivated by self-contained motor units, and are lighted from a trolly. By reason of their equipment, they are not unacceptable upon steam lines. (L. c. 427.)

* * * * * * * *

The difference between the local freight service of the Piedmont and Northern and that of the steam railroads consists chiefly in the use of the street-railway systems to gather up and deliver freight in the cities, the greater number of local freight stations on its lines between cities, the operation of its freight trains in smaller units and with greater frequency, and of a speedier delivery of local freight between near-by points.

The local passenger and local freight business thus described give to the road the peculiar features upon which the petitioner relies to distinguish it from the ordinary steam railroad. But this business constitutes only a small part of the petitioner's operations. Far greater is its general freight business, made possible by interchange relations with steam trunk lines in the south through which it is connected for the receipt and delivery of property with vast sections of the United States. (L. c. 428.)

That the Piedmont & Northern's passenger and local freight service constitute an insignificant part of its operations is strikingly borne out by the evi-

dence. In 1929, more than 94 per cent of its revenue was derived from freight (R. 417), a very large per cent whereof was carload traffic, moving in trains of from 20 to 45 cars (R. 413). It is safe to say that such operations do not fall within the common acceptation of what constitutes interurban electric railway service. The bulk of the Piedmont & Northern's freight is interchanged with the steam roads. Of all cars of freight handled in 1929, more than 95 per cent were so interchanged (R. 418–419), and, with the proposed lines built, the carrier estimates it will handle 82,000 additional cars in interchange the first year (R. 421). One of the main purposes of the proposed construction is to make of the Piedmont & Northern a link with the steam roads in new through routes for the movement of freight between the North, East, and West, and Florida points. (R. 405–406, 420.) It has estimated that its increased revenue for the first year would be $3,890,016.57 (R. 422) and that for the succeeding five years it would increase each year 8.4 per cent over the preceding year (R. 422).

The Piedmont & Northern Railroad, completed as proposed, would closely parallel existing railroads throughout its entire length and would touch no local point of importance not served by existing lines, and it seems that its expected increase in revenues would be obtained mainly at the expense of those other railroads now serving the locality. (R. 422.)

## II

**The words "interurban electric railway" have no settled meaning at law and therefore resort must be had to the context and the general purpose of the statute to insure correct interpretation**

The Piedmont & Northern's existing lines are, and its proposed lines would be, operated between cities with electric locomotives, but that is by no means sufficient to exclude the proposed construction from Commission authority. The fact that the railroad is, and will continue to be, interurban does not distinguish it from ordinary railroads since the latter are likewise universally operated between cities and towns. The additional fact that it will continue to employ electric locomotives does not necessarily bring the road within the scope of the exception, for certainly it can not be said that the complete electrification of any one of the big trunk-line systems would remove it from the Commission's authority under Section 1 (18). The outstanding conclusions that may be drawn from the courts' decisions differentiating particular electric railways from the "carriers by railroads" subject to the Act are: (1) That resort should be had to the context and the general purpose of the Act to determine whether the particular road's operations are of a kind intended to be subject to the regulatory authority, and (2) that the distinguishing characteristic of such electric railways as are not to be regarded as ordinary railroads, is the essentially local character of their operations, render-

ing them unfitted for doing the acts and committing the mischief intended to be regulated.

In *Omaha Street Ry.* v. *Int. Com. Com'n.*, 230 U. S. 324, the Court, in holding that an electrical railway operating in the streets of Omaha, Nebraska, and Council Bluffs, Iowa, and also interstate between those cities was not a *"railroad"* within the meaning of that term as used in the Act, and that its interstate fares were not, therefore, subject to Federal regulation, was constrained to resort to the context of the Act to determine whether the purposes sought to be attained fitted in with the operations of the particular railroad. After commenting upon the conflict in the decisions of the state and Federal tribunals upon the subject, it was said at page 335:

> But all the decisions hold that the meaning of the word is to be determined by construing the statute as a whole.

And again at page 337:

> Street railroads not being guilty of the mischief sought to be corrected, the remedial provisions of the statute not being applicable to them, commands upon every railroad "subject to the act" being such that they could not be obeyed by street railroads because of the nature of their business and character and location of their tracks, it is evident that the case is within that large line of authorities which hold that under such a statute the word "railroad" can not be construed to include street railroad.

And again, in distinguishing this road, which was interurban in that it operated between Omaha and Council Bluffs, from electric interurbans whose operations have a broader scope, the Court said, at pages 337–338:

> But it affirmatively appears that the company was chartered as a street railroad, and hauls no freight and is doing only a business appropriate to a street railroad. So that whatever the motive power or the size or speed of the cars is immaterial. In any event, there were "street cars," referred to in the act of Congress authorizing the construction of the Bridge from Council Bluffs to Omaha. (24 Stat. 501.) The company used such cars and did a street passenger business only. It laid its tracks in crowded thoroughfares of those cities and their suburbs and it is manifest that Congress did not intend that these tracks should be connected with Railroads for hauling freight cars and long trains through and along the streets of Omaha and Council Bluffs.

In *United States* v. *Village of Hubbard*, 266 U. S. 474, the court reached the opposite conclusion as to another electrical interurban railway, namely, that it was a railroad under the Act and subject to provisions forbidding the charging of fares that discriminate against interstate commerce. This decision rests mainly upon the ground that since Congress, in conferring new powers upon the Commission in 1920, expressly excepted certain inde-

pendently operated electric railways from some of the new powers so conferred, it thereby indicated that it "did not intend to deny to the Commission the power to regulate interurban railways in other respects." But this holding does not carry with it, as claimed by petitioner, the further holding that all independent railroads operating between cities and using electric locomotives are interurban electric railways within the meaning of the excepting clauses referred to. In the above case the court, after referring to the cases which hold that the Commission has no jurisdiction over electric street railways with respect to reasonable fares and charges, said (p. 477):

> We have no reason to inquire into the correctness of the latter ruling (*City of Wellsville* v. *United States*, 278 Fed. 769), as we are of opinion that the Commission's jurisdiction to prevent unjust discrimination by interurban electric railroads against interstate commerce is not so limited.

Certainly it could not have been within the contemplation of Congress that, if a Class I railroad, or any other operating between cities, should substitute electric for steam locomotives, thereafter it would not have to come to the Commission for authority to undertake new construction or to issue new securities. In this connection, too, the settled rule of this Court should be kept in mind that excepting clauses to remedial statutes should be

narrowly construed so as not to defeat the remedial processes intended to be accomplished. *Spokane & Inland R. R. v. United States,* 241 U. S. 344, 350.

In *Texas & Pacific Ry. v. Gulf, etc., Ry.,* 270 U. S. 266, involving the question as to whether a proposed track was an industrial track of a kind expressly excepted from Commission authority by paragraph (22) of Section 1 (the paragraph here under consideration), the Court said at pages 277–278:

> In support of its contention that the proposed line constitutes an industrial track, the Santa Fe cites instructions differentiating branches from spurs, which are given by the Interstate Commerce Commission in forms long prescribed for accounting purposes. It points also to uses made of these terms in other connections by courts, by the Commission, and by state legislatures. A truer guide to the meaning of the terms extension and industrial track, as used in paragraphs 18 to 22, is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by Transportation Act, 1920. By that measure, Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; that the property em-

ployed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss. See *Railroad Commission* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563; *The New England Divisions Case*, 261 U. S. 184; *The Chicago Junction Case*, 264 U. S. 258; *Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331. The Act sought, among other things, to avert such losses.

When the clauses in paragraphs 18 to 22 are read in the light of this congressional policy, the meaning and scope of the terms extension and industrial track become clear. The carrier was authorized by Congress to construct, without authority from the Commission, "spur, industrial, team, switching or side tracks * * * to be located wholly within one State." * * * But where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern. For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low

> rates in order to secure traffic enjoyed by another, may be inimical to the national interest. * * *

The tracks, concerning which this Court used the above-quoted language, were intended solely to serve certain manufacturing plants in the vicinity; they were to have no depots, stations, telegraph offices, express, mail, or passenger service; they were to carry neither local nor less-than-carload freight; the tracks came within the definition of "industry tracks" as the term was used by the Commission in its instructions issued for the use of the railroads in making out certain official reports.

The defendant in the case cited, as does the petitioner in the case at bar, asked the courts before which the case was heard to be governed by the literal meaning of the words involved, rather than by the obvious purpose of the Act as a whole. The District Court declined to go along with the defendant's contention (*Lancaster* v. *Gulf, C. & S. F. Ry. Co.*, 298 Fed. 488); the Circuit Court of Appeals, 5th Circuit, reversing the District Court, thought that the policy expressed in Transportation Act, 1920, should not be held to prevail over the "explicit provision" as to industry tracks (*Gulf, C. & S. F. Ry. Co.* v. *Texas & P. Ry. Co.*, 4 F. (2d) 904); while this Court unhesitatingly held that the policy and purpose of the Act constituted a truer guide to the proper construction of the language of the Act.

## III

**Under the terms of Section 15a the Commission must include the Piedmont & Northern with the steam roads when adjusting rates so as to yield a fair return on aggregate group property value**

Excepting clauses in respect of street, suburban, and interurban electric railways appear in two other sections of the Act as well as in Section 1 (22). The exception in section 20a, concerning the issue of new securities, is practically identical with that in Section 1 (22), herein involved, in that it excludes from Commission authority—

> a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation.

Section 15a, which directs the Commission to adjust rates so as to yield a fair return upon the value of the properties of the carriers as a whole, or as a whole in rate groups, and which provides for the recapture of excess income from carriers earning more than such fair returns, excepts from its operation—

> (b) street or suburban electric railways unless operated as a part of a general steam railroad system of transportation, (c) interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight.[1]

[1] Section 15 (3) excepts from the Commission's authority to establish through routes and joint rates those "between

The provisions with which we are here concerned and the above-mentioned sections 20a and 15a were added by the Transportation Act, 1920. Also in the latter Act, section 209, concerning the guaranty to carriers after the termination of federal control, excludes by paragraph (a)—

> a street or interurban electric railway, not under Federal control at the time Federal control terminates, which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power,

etc., and Section 300, which deals with the Labor Board, excludes by paragraph 1—

> any street, interurban, or suburban electric railway unless such a railway is operating as a part of a general steam railroad system of transportation. * * *

The two latter sections constitute no part of the Interstate Commerce Act. But reverting to sections 20a and 15a we find that the excepting clause in the former is worded substantially the same as that contained in the paragraph herein particularly involved, but that the excepting clause of the latter excludes—

> interurban electric railways unless operated as a part of a general steam railroad system

---

street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character." (36 Stat. 539, 551, 552.)

of transportation *or engaged in the general transportation of freight.*

Since more than 94 per cent of the Piedmont & Northern's revenues are derived from freight and the record shows in many other ways the very minor importance of its passenger traffic, it is clear beyond question that it is not excluded from Section 15a, but is, on the contrary, among the railroads enjoying the benefits of the revenue-producing provisions of that section.

## IV

**The provisions of Section 1 (18)–(22), herein involved, are particularly essential to the plan of Congress set up by Section 15a and other amendments in that they place restrictions upon competitive duplication of lines that would wastefully increase aggregate or group property values, thereby burdening the rates and endangering the financial stability of established systems of transportation**

The fact that there can be no question but that appellant is subject to Section 15a is a particularly important consideration in this controversy, for Section 15a and the provisions hereunder consideration are both essential cogs in the machinery set up by the Transportation Act, 1920, with one great objective in view.

This Court has frequently had occasion to pass upon the changes made in the Interstate Commerce Act by the Transportation Act, 1920, and has directed attention to the fact that those amendments are interrelated parts of a whole scheme to attain a particular purpose. Broadly speaking, the pur-

pose was to secure for the country as a whole an effective transportation service, but an effective transportation service, in the sense of transportation furnished at just and reasonable rates (Sec. 15a (2)), could not be secured by provisions looking merely to increased rates. It was necessary to avoid unduly burdensome rate increases. *New England Divisions Case,* 261 U. S. 184, 191. And it was no part of the plan of Congress to permit unrestricted competitive duplication of lines and plant that would wastefully increase aggregate or group property values, thereby unduly burdening rates and endangering the financial stability of established systems of transportation. *Texas & Pac. Ry.* v. *Gulf, etc., Ry.,* 270 U. S. 266. The Act contains many provisions looking to economies in operation, notable among which are those seeking to effect that end through closer cooperation of the carriers in the rendering of a unified general transportation service. It will have been noted that the efficient and economical operations, which are a prerequisite under Section 15a (2) to the fair return provided for, are the operations of the carriers as a whole, or as a whole in rate groups. Economical operation of the carriers as a whole can not exist where unrestricted competitive duplications of service are permitted and, accordingly, Congress enacted provisions intended to make unnecessary the wasteful duplication of facilities, such, for example, as the provisions looking to the common use of terminals and tracks (Sec. 3 (4); *R. R.*

*Comm.* v. *Southern Pacific Co.*, 264 U. S. 331), and the provisions enlarging the Commission's authority to require the carriers to join in the making of through routes and the establishing of joint rates (Sec. 15, (1) to (6)). Congress at the same time placed direct restrictions upon duplication of plant by requiring the carriers to secure the Commission's authority before issuing new securities (Sec. 20a (1)–(11)) and before undertaking new construction or extension of lines (Sec. 1 (18)–(22)). The latter are the provisions, above quoted, with which we are directly concerned here.

This plan of Congress is made very clear in *Wisconsin R. R. Comm.* v. *C. B. & Q. R. Co.*, 257 U. S. 563; *Dayton-Goose Creek Case*, 263 U. S. 456; *New England Divisions Case*, 261 U. S. 184; *Texas & Pac. Ry. Co.* v. *Gulf, etc. Ry.*, 270 U. S. 266; and *Texas* v. *Eastern Texas R. Co.*, 258 U. S. 204. That the particular provisions herein involved, namely, those requiring the Commission's authority for the construction of new lines, are essential to the plan is shown in the *Texas and Pacific Case*, the *Wisconsin Case* at page 585, and in the *Dayton-Goose Creek case* at page 478. In the first above-named case, namely, *Texas & Pac. Ry. Co.* v. *Gulf, etc. Ry.*, 270 U. S. 266, an injunction was sought to prevent a railroad from building a new line without the authority of the Commission. The suit was defended on the ground that what was proposed to be constructed was an industrial track expressly excepted by paragraph (22) from the requirement

that the Commission's authority be first had and obtained. The contention was there the same as made here, namely, that the extension was of a class excepted from the Commission's authority by said paragraph (22). The Court in the language quoted, supra (page 34), considered that the best guide as to whether the proposed line was an extension or was within the excepted classes was furnished by giving consideration to the purpose served by the particular provision in the general scheme of regulation inaugurated by the Transportation Act.

## V

**The difference between the language of the exception stated in Section 15a and that of Section 1 (22), whereby an electric interurban railroad engaged in the general transportation of freight is expressly kept within the operation of the former section but not specifically brought within the scope of the latter, may be explained and accounted for without construing Section 1 (22) in the manner proposed by the petitioner, which construction would frustrate the remedial purposes of the Transportation Act**

As above shown the prevention of wasteful duplication of lines was an essential part of the scheme of the Transportation Act to promote an effective transportation service at just and reasonable rates.

Unquestionably some consideration must be given to the difference in language of the excepting clause of Section 15a and that of Section 1 (22), herein under consideration, namely, to the fact that, while under the express language of Section 15a

an electric interurban is not excluded if it is engaged in general transportation of freight, such a carrier is not mentioned in Section 1 (22). But it does not follow that the inference to be drawn is that asserted by petitioner. The reason for the difference in language and an explanation consistent with the purposes of the Act is that while an electric interurban, which has, in connection with its local business, built up a considerable interstate freight business, should for the sake of uniformity in rates, be included in the general rate adjustments provided for in Section 15a, still if its principal business continues to be the purely local carriage of passengers and small freight, the extension of its lines and facilities for such purposes likewise remains a matter chiefly of local concern and should be left to local authority. But where, as here, the physical railroad, as linked up by the proposed extensions, will cross state lines and where, as here, the usual electric interurban passenger business is inconsequential, the exclusively local passenger and freight buiness is a small proportion of the whole and the avowed purpose of the extension of lines is to assure petitioner of a strong position as a participant in through traffic with large trunk-line railroads, the local interest in the new extensions certainly does not overweigh the federal interest in what was characterized by the lower court as—

> an interior connecting link in a new through route and effective trunk line of connecting carriers leading from Florida on the south

> throughout the southeast and to the northern gateways reached by the Norfolk & Western, and in the reverse direction. (R. 421.)

In *R. R. Com'n. of Calif.* v. *Southern Pacific*, 264 U. S. 331, there was involved the question as to whether Commission authority under these very paragraphs (18)–(22) of Section 1 was necessary for the rearrangement of track necessary in connection with the installation of a new union station, which had been ordered by the State Commission. While the Court conceded that state authority might be exercised to require construction of a small local union station not involving changes in main track or substantial capital outlay, it then went on to say, at page 346:

> But there is a great difference between such relocation of tracks or local union stations and what is proposed here. The differences are more than that of mere degree; they and their consequences are so marked as to constitute a change in kind. They come within paragraphs 18 to 21 of section 402 and require a certificate of the Interstate Commerce Commission as a condition precedent to the validity of any action by the carriers or of any order by the State Commission.

Since in the instant case the issue is likewise as to whether the new construction is of a kind to which federal authority attaches or whether of a kind intended to be left to local authority, the above recognition by the Court that the nature of new

constructions and its consequences may constitute a change in kind, rather than in degree, seems particularly pertinent. While in the beginning the Piedmont & Northern's operations may have been principally of local interurban character, its revenues are now 94 per cent derived from freight, 95 per cent carload traffic and mostly interchanged with the steam roads. Its proposed construction would make of it a still more important link in the national transportation system.

To attribute full scope to the difference in language between the exception in Section 15a and the exception in Section 1 (22) seems impossible. Assume that a large trunk-line railroad should completely electrify its lines, it would then, in a broad sense, be an electric interurban railway, but still, because it is engaged in the general transportation of freight, it would be a carrier within the definition of Section 15a whose property value is to be included with that of the other carriers of its rate group as a basis for rates that will yield a fair return. And yet, merely because the electric interurbans, excepted from the Commission's authority over new construction, are not in express words confined to those not engaged in freight transportation, it could, under the construction advocated by petitioner, duplicate the existing lines of competitors and extravagantly swell the aggregate property value of the rate group upon which the public is to pay rates that will yield a fair return.

Likewise, since the language of the excepting clause in Section 20a is the same as that contained in the exception to the Commission's authority over new construction (Section 1 (22)), such trunk line, or those in control of its stock, could issue new securities at will, thereby bringing back the conditions which induced Congress to clothe the Commission with authority over the issuance of new securities by the carriers.

This is entirely contrary to the well thought out and coordinated plan of the Transportation Act to provide an effective transportation service at just and reasonable rates, essential to which is the safeguarding of the revenues of established systems of transportation against wasteful competition. It gives too much weight to the absence of language limiting the excepted electric interurbans to those not engaged in freight transportation and too little weight to the fact that, as aforesaid, the words electric interurban railways have themselves no settled meaning at law, definitely distinguishing them from ordinary railroads subject to the Act.

In *Spokane & Inland R. R.* v. *United States,* 241 U. S. 344, the question was involved as to whether the clause in the Safety Appliance Act excepting from its operation cars used upon street railways rendered that Act inapplicable to cars of an electric interurban which were both in street railway and interstate business. The Court held that the primary provisions of the Act were applicable, stating at page 350:

> We say this because while it is conceded that the obvious purpose of Congress in enacting the law and its amendments was to secure the safety of railroad employees, and that the amendment of 1903 sought to enlarge and make that purpose more complete, yet it is insisted that the exception in the act should receive such a broad construction as would destroy the plain purpose which caused the act to be adopted. But to so treat the act would be in *plain disregard of the elementary rule requiring that exceptions from a general policy which a law embodies should be strictly construed, that is, should be so interpreted as not to destroy the remedial processes intended to be accomplished by the enactment.* That the meaning contended for would be in direct conflict with this rule would seem free from doubt, since the inevitable result of sustaining the contention would be to put it in the power of a railroad by operating a train for a trifling distance over tracks within the exception to thereby secure the right thereafter to operate such train over long distances without regard to compliance with the safeguards of the statute which otherwise would be controlling. (Italics ours.)

Similarly in the case at hand, if a broad construction rather than that called for by the rule, should be given to the excepting clause of Section 1 (22), a steam railroad could by electrifying its lines secure the right thereafter to extend its lines into the territory of other carriers at will. The instant

situation of petitioner's proposed extension of lines without obtaining certificate of the public need therefor would operate quite as much to defeat the safeguards set up by the statute for the protection of carriers and the public. As said by this Court in *Texas & Pac. Ry.* v. *Gulf, etc., Ry., supra,* at page 278:

> But where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern. For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest.

It should be noted that not only street, suburban, and interurban electric railways are excepted from the Commission's authority over new construction, but also steam carriers not engaged in interstate commerce. This is apparent from the fact that Section 1 (18) applies only to carriers subject to the Act and that Section 1 (1) of the Act limits carriers subject to the Act to those engaged in interstate and foreign commerce. And yet it appears that the Commission has authority over the abandonment by an interstate steam road of a branch line wholly located in one State. In *Colorado* v. *United States,* 271 U. S. 153, the Court in uphold-

ing an order of the Commission authorizing, under this very paragraph (18) of Section 1, the abandonment of lines located wholly within a State over the protest of the State, based its action on the same ground as is here urged in support of the Commission's authority over unnecessary new construction. At page 163 the opinion reads:

> The sole objective of paragraphs 18–20 is the regulation of interstate commerce. * * * The exertion of the Federal power to prevent prejudice to interstate commerce so arising from the operation of a branch in intrastate commerce is similar to that exerted when a State establishes intrastate rates so low that intrastate traffic does not bear its fair share of the cost of the service, *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*; 257 U. S. 563; *Nashville, Chattanooga & St. Louis Ry.* v. *Tennessee,* 262 U. S. 318; or when the State authorities seek to compel the erection of a union station so expensive as unduly to deplete the financial resources of the carriers, *Railroad Commission* v. *Southern Pacific Co.,* 264 U. S. 331; or when one railroad seeks to construct an intrastate branch line, which will deplete its own financial resources or those of another interstate carrier, *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.,* 270 U. S. 266.

All of the contemporaneous amendments are interrelated parts of the whole plan of Congress. Each is necessary to ensure shippers that rates ad-

justed pursuant to the Act will not be unfairly placed or based on group property value in excess of the needs of commerce, and to protect the revenues of established lines from wasteful competition. What was said in the *Wisconsin Case, supra,* (p. 586) of the provision relating to burdensome intrastate rates is equally, if not more, applicable to the provisions intended to restrict unneeded new construction, namely, that it is impossible to escape the dovetail relation between that provision and the new policy inaugurated by Transportation Act, 1920.

In the instant case it is proposed to duplicate existing railroad lines. What is commonly understood as local electrical interurban service would be of minor importance, such service being apparent in this case only to an infinitesimal degree. The chief purpose is admittedly to entrench the Piedmont & Northern in a strong position to compete with the steam roads. But the existing roads are shown to be adequate not only for present needs but for a vastly increased volume of traffic and, accordingly, the resulting increasing group-property value as a basis for rates would place an unnecessary burden upon interstate commerce and one entirely out of proportion to the possible improvement in local service.

Therefore, since, as above shown, by far the greater part of the Piedmont & Northern's business is of steam-railway character, and the purpose of the proposed extensions is primarily to enlarge,

and to still further fortify its position in respect of business of that character, it is certain that the Piedmont & Northern is of the class of carrier fitted to commit the mischief which the statute is intended to prevent. This is the only reliable criterion available to determine whether it is among the carriers intended to be regulated or is within the class of carriers intended to be excepted from the statute. Moreover, the rule should be kept in mind that excepting clauses must be narrowly construed so as not to defeat the main objective of the statute (*Spokane & Inland Empire R. Co.*, v. *U. S.*, above quoted from), and that in this case such main objective constitutes an important cog in the machinery set up by Congress to promote an effective general transportation service at just and reasonable rates.

## VI

**The plan of Congress for an effective general transportation system contemplates that its restrictive provisions as well as those conferring benefits should be uniformly applicable to all carriers constituting real links in the transportation chain**

It has been shown that the Piedmont & Northern enjoys the advantages of the revenue producing provisions of the Act. It has also been shown that the main purpose of the proposed extensions of lines is to entrench the carrier more firmly as a link in the chain of the country's general transportation system, and in order to do so it must avail itself of the provisions of the Act making it the

duty of the carriers to afford reasonable and equitable facilities for interchange of traffic (Sec. 3 (3)) and those provisions making it mandatory upon the Commission to establish through routes and joint rates whenever deemed desirable in the public interest.[1] It has been pointed out that one of the purposes of making through routes generally available to the carriers was to eliminate the incentive for the duplication of lines in competitive territory. It has also been pointed out that, while the proposed extensions of lines will go to swell the aggregate or group property value and will seriously deplete the revenues of established lines, they have been found by the Commission not to be needed in the public interest because said established lines afford ample transportation for existing commerce and its reasonably to be expected future growth. Accordingly, it is not reasonable to suppose that Congress intended that such a carrier, participating substantially in the general transportation of commerce engaged in by the steam roads, should be permitted to avail itself of the advantages of certain of said interrelated provisions enacted by the Transportation Act while at the same time refusing to submit to the restrictive provisions to which other carriers are subject and which are

[1] The Piedmont & Northern is enjoying all these benefits, including the Commission's protection against unduly low rates required by State authority. *South Carolina Fares and Charges*, 60 I. C. C. 290.

essential for the welfare of the transportation system as a whole.

## CONCLUSION

We respectfully submit that the decree of the lower court should be affirmed.

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DANIEL W. KNOWLTON,
*Chief Counsel,*
*Of Counsel.*

APRIL, 1932.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1931.

No. 664.

PIEDMONT & NORTHERN RAILWAY COMPANY, *Petitioner*,

*v.*

INTERSTATE COMMERCE COMMISSION, SOUTHERN RAILWAY COMPANY, CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY, ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, CAROLINA, CLINCHFIELD & OHIO RAILWAY, CAROLINA, CLINCHFIELD & OHIO RAILWAY OF SOUTH CAROLINA, AND CLINCHFIELD NORTHERN RAILWAY OF KENTUCKY.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.**

**BRIEF FOR THE RESPONDENTS, OTHER THAN THE INTERSTATE COMMERCE COMMISSION, IN OPPOSITION.**

S. R. PRINCE,
F. B GRIER,
CARL H. DAVIS,
WILLIAM C. BURGER,
JAMES J. MCLAUGHLIN,
SIDNEY S. ALDERMAN,
*Solicitors for Respondents.*

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PIEDMONT & NORTHERN RAILWAY COMPANY, *Petitioner*,

*v.*

INTERSTATE COMMERCE COMMISSION, SOUTHERN RAILWAY COMPANY, CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY, ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, CAROLINA, CLINCHFIELD & OHIO RAILWAY, CAROLINA, CLINCHFIELD & OHIO RAILWAY OF SOUTH CAROLINA, AND CLINCHFIELD NORTHERN RAILWAY OF KENTUCKY.

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.**

**BRIEF FOR THE RESPONDENTS, OTHER THAN THE INTERSTATE COMMERCE COMMISSION, IN OPPOSITION.**

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## OPINION BELOW.

The opinion below, of the United States District Court for the Western District of South Carolina (R. 435-457), is reported in 51 F. (2d) 766. The District Court, in compliance with Equity Rule 70½, found the facts specially (R. 402-433) and stated separately its conclusions of law

thereon (R. 433-435). It further referred in its opinion to, and filed in the cause with its opinion, a "Note", consisting of a brief filed by counsel for petitoner, defendant below, wherein was reviewed the legislative history of the Transportation Act, 1920, particularly of those sections containing references to interurban electric railways (R. 458-486).

## JURISDICTION.

The petitioner invokes the jurisdiction of this Court under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. 347 (a).

## QUESTION PRESENTED.

The petitioner's brief (p. 14) states in only its negative aspect the principal question presented, which necessarily has both positive and negative aspects. It may be more accurately stated thus:

Whether the District Court erred in holding that petitioner was forbidden from building its proposed extensions of railroad lines, without first securing certificate of public convenience and necessity from the Commission, by reason of the inhibition of Section 1, paragraph (18) of the Interstate Commerce Act as amended by Transportation Act, 1920, 49 U. S. C. 1 (18), and was not free to build said extensions without certificate, as being "an interurban electric railway which is not operated as a part or parts of a general steam railroad system of transportation," within the meaning of the exclusion language of Section 1, paragraph (22) of said Act as amended, 49 U. S. C. 1 (22).

In addition to its statement of the principal question raised, the petition says (p. 14):

> "Error is also assigned to the facts found by the District Court and to the exclusion of evidence relating to the interurban character of petitioner's railway, but these assignments of error raise no separate ques-

tions and are merely incidental to the principal question presented."

But it is to be observed that the assignments of error (Assignments VI, VII, VIII, IX, X, XI; R. 496-499) charge no error in any of the facts actually found by the District Court as to the history, construction, character of lines, equipment, traffic, revenues, methods of business, and national scope of the railroad business of petitoner and as to its importance as a competitor for interstate railroad business. Those findings are unchallenged. These assignments only charge error in failing to make additional and more specific findings as to electrical equipment and operation resulting in certain differences from steam railroad operations, and one assignment (XII, R. 500) charges that facts found as to threatened construction are irrelevant and immaterial.

## STATUTES INVOLVED.

The applicable statutes are set forth in the Appendix, *infra*, pp. 29-31.

## THE POSITION OF THESE RESPONDENTS AS TO THE PETITION.

These respondents, the principal steam railroads of the territory which would suffer traffic diversion and revenue depletion by the competition of the petitioner's extended lines if the enjoined extensions were built, while parties in interest expressly authorized by the statute, Section 1, paragraph (20), 49 U. S. C. 1 (20, to bring an injunction suit of this character, are, nevertheless, in this suit as interveners.

These respondents understand that this Court will take jurisdiction by certiorari of a cause pending on appeal in a circuit court of appeals, before the determination of the appeal by that court, only in an extraordinary case, a case

presenting not only a question of public importance, but also peculiar reasons for extraordinary celerity in reaching a final determination by this court without awaiting the statutory appellate procedure under which the circuit court of appeals has jurisdiction. *United States v. The Three Friends,* 166 U. S. 1; *American Construction Co. v. Jacksonville, etc., R. Co.,* 148 U. S. 372; *The Conqueror,* 166 U. S. 110; *Panama R. Co. v. Napier Shipping Co.,* 166 U. S. 280; *Hamilton Brown Shoe Co. v. Wolf,* 240 U. S. 251; *Spiller v. Atchison, etc., R. Co.,* 253 U. S. 117.

On the merits these respondents assert that the decree of the District Court below was manifestly right and they oppose the petition in so far as prayed on asserted incorrectness, or asserted doubt as to the correctness, of the decree below. They further assert that the record discloses no peculiar reason entitling petitioner to ask extraordinary celerity at this stage of a cause which has a background of five years of litigation. This case involves "an important question of federal law" only in the same sense in which any other case involving the question whether a particular electric railroad falls within the provisions of paragraph (18) or within the provisions of paragraph (22) would involve such important question.

These respondents think the decision below is so clearly right that no case is presented for the exercise by this Court of its discretion to review on certiorari. However, if it be deemed a proper case for ultimate review here, and in view of the position taken by the original plaintiff, the Interstate Commerce Commission, on brief, these respondents are just as willing that certiorari be granted now as after determination of the appeal by the Circuit Court of Appeals.

## STATEMENT OF THE CASE.

As far as it goes, the petitioner's statement of the case is fair and accurate. It needs some amplification. The character of petitioner as a railroad, the character of its

railroad lines and business, are shown by findings of facts by the District Court, the correctness of which is not challenged in the assignments of error, and which may be abbreviated as follows:

Petitioner is a corporation of South Carolina, chartered as a regular railroad, having all the powers of any railroad under the laws of that state, with full power of eminent domain and power to operate by electricity or other motive power. (R. 403, finding 1.)

Only 2.9 miles of its present total mileage of 127.89 miles of railroad, or about 2.25 per cent, is located in city streets. The rest is built and operated on private right of way and goes around rather than through the cities. (R. 404, finding 2.)

Petitioner's present railroad lines were built by the Duke Power interests in the pursuance of an extensive scheme for building lines of freight carrying electric railroad to render an extensive interstate freight service, in addition to ordinary interurban service in local freight, passengers, baggage and express. The ultimate plan, to be accomplished by steps, was to achieve a continuous line of electric railroad from a connection with Seaboard Air Line in South Carolina, through important industrial cities in South and North Carolina, to Durham, N. C., to another connection with the Seaboard, and even further. (R. 404-405, finding 3.)

The immediate object was to build into and tap very heavy and attractive industrial traffic concentrations in the piedmont of each of those states and to divert a substantial part of this freight traffic from steam railroads, principally these respondents, to new interstate joint through routes to be formed by the lines of petitioner in connection with the interstate Seaboard system, which itself theretofore had no practicable access to the major part of these traffic concentrations. (R. 405, finding 4.)

Even before the lines were constructed an important traffic agreement was made with the Seaboard, containing

reciprocal, preferential agreements for routing traffic, to create and make effective the new joint through routes, and in which agreement the Seaboard granted highly favorable divisions to the petitioner's railroad. (R. 406-407, findings 7 and 8.)

The immediate effect of beginning operations on petitioner's lines under this agreement with the Seaboard was the diversion from these respondents' lines of a very substantial part of the interstate traffic of the industrial piedmont sections of the two states, the new through routes extending not only throughout the southeast but to all parts of the United States. (R. 419-420, finding IV, 10.)

The powerful and continuing effect of the agreement with the Seaboard is shown by the carload interchange of petitioner with Seaboard as compared with that with other steam roads. From 1927 to April, 1930, petitioner had annual carload interchange with Seaboard of from 54,477 carloads to 73,250 carloads, the interchange with the Seaboard being 75.5 to 78.5 per centum of petitioner's carload interchange with all steam railroads. (R. 418-419, finding IV, 9.)

Petitioner's present lines of railroad were originally built and are now standard gauge, standard railroad construction. They were built as higher class railroad lines than Southern Railway Company's lines in the same territory at the time. A heavy and expensive type of construction was adopted with a view to handling substantial interchange freight traffic in connection with steam railroads. The same ruling grades as those of the Southern and the Seaboard in the same territory were adopted. Eighty pound rail was used and has been maintained in excellent condition. To accomplish the ruling grades and to adapt the lines to heavy freight traffic, cuts and fills of steam railroad standard were used. The roadbed, ballast, crossties, turnouts and switches, culverts, drainage and trestles are all of standard single track steam railroad construction and excellently maintained. The trestles and bridges

were built according to standard railroad specifications. The sharpest curvatures on the lines are much less than corresponding curvatures on Southern and on Louisville & Nashville. Certain differences in construction exist which are incident to the use of electricity as motive power rather than steam. Coal chutes and water tanks are absent. The rails are bonded for electrical transmission. Overhead power is conveyed by catenary type trolleys supported by double standards, rather than by trolleys of the ordinary street car type. Petitioner has electric sub-stations for power along its lines and operates on 1500 volt direct current. (R. 411-412, finding II, 1.)

Petitioner proposed to use one hundred pound rail on its proposed extensions and to build its bridges thereon according to standard railroad double track standards, looking toward the extension of its interchange freight traffic. (R. 412, finding II, 2.)

With the exception of its electric locomotives and its passenger cars, the rolling stock equipment of petitioner is standard steam railroad equipment. It has 17 electric locomotives, ranging from 55 tons weight and 800 tonnage rating to 100 tons weight and 1,350 tonnage rating. It has 19 passenger cars, 17 of which are equipped with self-contained motor units, and 2 of which are trailers, without motors. It has 287 freight cars, which have no electrical equipment and are exactly the same in all respects as steam railroad freight cars. This, together with an official car, makes 288 cars interchangeable with steam railroads and which move constantly and freely over steam railroads all over the United States. Foreign line freight equipment of every character from the whole country moves constantly and freely over the lines of petitioner. As of December 31, 1929, the total investment in equipment since June 30, 1914, was $778,194.11, and of that total $674,803.04, approximately 85 per cent, represented expenditures for locomotives and interchangeable freight cars, equipment used exclusively in freight carriage. The

electric locomotives are not used for passenger service but only for freight. Petitioner's freight yards are of standard steam railroad construction and equipment. One of the principal yards is a joint facility with Seaboard and Georgia & Florida, steam railroads. A peculiarity of electric motive power is that the same locomotives are used for switching service and for line haul, the added power for heavy trains in line haul is secured by doubling the locomotives, which practically doubles the power, hence petitioner finds it unnecessary to have very large or heavy individual locomotives for line haul. Its locomotives are considerably lighter than the heaviest electric locomotives employed on electrified portions of such steam railroads as the Virginian and the Pennsylvania, but they are fully adequate to carry the traffic of petitioner. By doubling, its locomotives draw as many as 65 freight cars, and trains of 40 to 50 cars are quite usual. (R. 412-413, finding III, 1.)

Petitioner's local passenger business is handled in the method of what is ordinarily known as street, suburban and interurban passenger business, in street car-type cars, having self-contained motor units, sometimes with a trailer, but never more than two cars being operated together. It does not operate passenger trains of several cars. But as to part of its passenger business, petitioner has entered an interstate and national field. It has operated a through Pullman schedule in connection with the Seaboard. It is a member of the Southern Passenger Association, publishes and sells passenger fares to and from points all over the country in connection with steam carriers. It sell winter tourist tickets, convention tickets, tickets to Havana, Cuba, excursion tickets to Norfolk, Washington and northern points, in connection with steam roads, and it checks baggage on passenger tickets to points all over the country. It interchanges passengers on through interstate tickets but does not interchange passenger cars. In its freight business it interchanges loaded

freight cars in through interstate transportation. (R. 413-414, finding IV, 1.)

Its operating methods for the handling of its freight business are indistinguishable from single track steam railroads of the territory, except as to such differences as are merely incidental to electric motive power. It operates through freight trains and local freight trains in substantially the same manner as the steam railroads. Its trains are operated under train orders, clearance cards, meet orders, changes in orders, rules as to superior and inferior trains, air brakes, hand brakes, train protection, and many other details just as are trains of steam roads. Its signal system is not of such high class as the systems employed by longer lines of the steam railroads of the territory. It uses a selector semaphore system. Some of the steam railroads use systems based on the same principle. Petitioner serves industries directly from its lines and industrial tracks over industrial tracks belonging to industries, and over industrial tracks belonging to steam railroads, in substantially the same manner as is done by the steam railroads. The industries load solid cars to distant break-bulk points, which are picked up and given line haul by the petitioner, and by it delivered to connections and expedited to the break-bulk point, in substantially the same manner as by the steam railroads. The incoming freight from distant points comes in by steam railroad connections of the petitioner to its freight houses and is distributed by it substantially in the same manner as by steam railroads. It operates regularly scheduled daily freight package cars in connection with steam railroads from 18 distant points, including points as distant as Chicago, Boston, Providence, R. I., New Orleans, and St. Louis. This package car service is in connection not only with interstate steam railroads but also with ocean steamship lines. (R. 414-415, finding IV, 2.)

Petitioner's methods of business solicitation, its membership in traffic organizations, and its tariffs, published and concurred in, are national in scope. It maintains an

extensive traffic organization competing for traffic throughout the United States wherever it can secure a haul, either as originating, delivering or intermediate carrier. A number of its traffic representatives are joint employees representing petitioner and Durham & Southern, a steam railroad engaged in interstate commerce, owned by interests closely affiliated with those owning petitioner. It is a member of American Railway Association, Railway Accounting Officers' Association, Southern Association of Car Service Officers, Southern Claims Conference, Traffic Club of New York, Association of Railway Executives, Southern Freight Association, Southern Weighing and Inspection Bureau, Southeastern Demurrage and Storage Bureau, all steam railroad associations. It has membership on both the General Committee and Executive Committee of the Southern Freight Association, with voting power equal to any member interstate railroad. It has a regular contract with Railway Express Agency, Inc. It is a member of the Per Diem Agreement of steam railroads governing interchange of freight equipment. It repairs foreign line freight cars on its own lines and foreign line steam railroads repair its cars on their lines. It publishes and has filed 17 general individual tariffs under I. C. C. serial numbers of its own; it is a party as initial carrier to 184 general tariffs filed with the Commission; it is a participating carrier in 364 tariffs published under powers of attorney given by it to the publishing steam railroads. The scope of its tariffs embraces the entire country and parts of Mexico and Canada. It has the power, by changes in its own tariffs, to affect the tariffs and rates of steam railroads all over the United States. From 1916 to April 1, 1930, it has filed 303 proposals with the Southern Freight Association for rate changes to and from points all over the United States. (R. 415-416, finding IV, 3.)

From the beginning of the operation of petitioner's present lines, its freight revenues have been large and

have almost constantly increased, while passenger revenues, although in the first few years substantial, have progressively decreased. Its freight revenues have increased from $496,772.39, for the year ending June 30, 1914, to $2,340,809.58, for the year 1927, and $2,317,528.77, for the year 1929. Its total passenger revenues for the year ending June 30, 1914, were $324,045.21, and increased to a maximum of $871,775.17 for the year 1918. That was the only year in the history of its operations in which passenger revenues exceeded freight revenues, this condition being caused by the location of large army camps on and near its lines during the war. Since that year its passenger revenues have progressively decreased until they amounted to only $71,562.72 for the year 1929. For 1929, its freight revenues were 94.5 per cent, and its passenger revenues 2.9 per cent, of total revenues. (R. 416-417, finding IV, 4.)

A very small part of petitioner's freight business and of its total revenues comes from transportation of local freight, and the predominant part comes from interchange of freight with interstate steam railroads. For 1927, 5.9 per cent of total freight revenues were from local freight, and 94.1 per cent from interline interchange freight. These percentages were, for 1928, 4.5 per cent local freight, and 95.5 per cent interline interchange freight; for 1929, 4.3 per cent local freight, and 95.7 per cent interline interchange freight. (R. 417-418, finding IV, 5.)

The reverse is true as to passenger revenues, which in themselves have become of only minor importance. For 1927, 97.5 per cent of passenger revenues were local revenues, and 2.5 per cent interline revenues. For 1928 and 1929, the percentages were 97.8 per cent local and 2.2 per cent interline. (R. 418, finding IV, 6.)

Since 1916, petitioner has been in the millionaire class, a Class I railroad with operating revenues over a million dollars annually. Since 1923, its operating revenues have exceeded two million dollars annually. For 1927, they were $2,523,092.42, of which $2,340,809.58 came from

freight. For 1928, total revenues were $2,346,513.05, of which $2,185,110.36 came from freight. For 1929, its total revenues were $2,451,992.34, of which $2,317,528.77 came from freight. (R. 418, finding IV, 7.)

Dividing its freight revenues as between those from interstate and those from intrastate freight, the following are percentages: 1927, 89 per cent from interstate freight and 11 per cent from intrastate freight; 1928, 82.1 per cent interstate and 17.9 per cent intrastate freight; 1929, 80.7 per cent interstate and 19.3 per cent intrastate. The intrastate revenues referred to include freight interchanged with steam railroad connections but originating and destined to points within the same state. (R. 418, finding IV, 8.)

There is more than one loaded car of freight each day on petitioner's line for every passenger carried. Its average interchange of carload freight with steam railroads of the territory is approximately 6,000 cars per month. It forwards and receives carloads of freight to and from points all over the United States and points in Canada and Mexico. (R. 419, finding IV, 9.)

If petitioner's threatened extensions, or either of them, should be built, new and important joint through routes would be opened up to it. If both threatened extensions should be built, it would connect with Georgia & Florida, a steam railroad, at Greenwood, S. C., on the south, and with Norfolk & Western, a steam railroad, at Winston-Salem, N. C., on the north, and would thereby become the interior connecting link in a new through route and effective trunk line of connecting carriers leading from Florida throughout the southeast and to the northern gateways reached by the Norfolk & Western, and in the reverse direction, which would be strongly competitive with the existing trunk lines of the territory. If only the threatened extension from Spartanburg, S. C., to Gastonia, N. C., should be built, making interstate connection of the present lines, the same result would obtain, except that

the route from Charlotte to Winston-Salem and the connection there with Norfolk & Western would not be entirely over petitioner's own lines, but would be over a joint route formed by Norfolk Southern to Norwood, and Winston-Salem Southbound to Winston-Salem. (R. 420-421, finding V, 1.)

Petitioner's own estimate, made in its application to the Commission for a certificate for its extensions, was that the extensions would gain new business diverted from the steam railroads of 82,320 cars a year, including 12,300 cars of bridge traffic carried entirely over its lines as the interior connecting link in the aforesaid joint through routes, with a gain to itself of total new revenues of $3,890,016.57 for the first year, and it estimated that this revenue gain would be increased at the rate of 8.4 per cent for each year thereafter, reaching $5,822,344.01 the sixth year. By reason of the fact that they would lose a longer haul on such diverted traffic than the petitioner would gain, the witnesses of the intervening steam railroads estimated that the loss of revenues to their roads caused by the building of the threatened extensions would be at least twice the revenues to be gained by petitioner. Petitioner's threatened extensions, if built, would divert from the intervening steam railroads millions of dollars of freight revenue annually, to their irreparable injury. (R. 421,422, finding V, 2.)

The enjoined extensions, if built, would directly compete with and injure a new cut-off line of the Louisville & Nashville from the Harlan County coal fields, which was built under authority of a certificate of the Commission, at a total cost of over five million dollars. Louisville & Nashville built this new line before it learned of petitioner's threatened extensions. The building of petitioner's extensions would create a new through route from the coal fields on the Norfolk & Western, directly competing with and diverting traffic from the new through route

of the Louisville & Nashville authorized by the Commission. (R. 422, finding V, 3.)

The Duke Power Company interests and allied trusts and interests controlling and owning petitioner are large shippers and receivers of freight and have a large power for controlling freight traffic of others in the territory. This power to control freight traffic is used to favor petitioner's lines of railroad and to favor the railroad of the Durham & Southern, owned by allied interests. The intervening steam railroads have felt sharply the effect of this control of traffic in favor of petitioner. (R. 422-423, finding V, 4.)

The overwhelmingly predominant part of petitioner's business is interchange interstate freight traffic of national character and scope, essentially the same, and in all essential respects conducted the same, as the business of the steam freight carriers of the territory. Such differences in construction, equipment, operations and method of handling as exist are purely incidental to the use of electric motive power instead of steam. Petitioner's purely local traffic in freight, passengers, baggage, and express is so small as to be relatively inconsequential. The probable effect of the proposed extensions, if built, either one or both, would be a substantial gain in interchange interstate freight traffic of national importance. The purely local traffic to be gained would be inconsequential. (R. 423-424, finding V, 5.)

## ARGUMENT.

### I.

**The question here raised is admitted to be an important question of federal law which has not been expressly settled by this court, but it is controlled by previous decisions of this court interpreting the Transportation Act, 1920.**

We admit that the question as to the scope of the application of the inhibitions of Section 1, paragraphs (18)

to (21), of the Interstate Commerce Act, as amended by Transportation Act, 1920, 49 U. S. C. 1 (18) to (21), to independently owned and operated interstate freight carrying electric railroads, and as to the scope of the language of paragraph (22) of that section in excluding from federal regulation extensions and abandonments of "interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation," is an important question of federal law.

We admit that this Court has not in terms defined the scope of the quoted part of the language of paragraph (22). The question of its scope is not of a character to be defined once for all in an opinion. It is the character of question which this Court has always dealt with by the "gradual process of judicial inclusion and exclusion."

Whether a particular carrier falls within the inhibitions of paragraphs (18) to (21) or within the exceptions of paragraph (22) necessarily depends upon the facts as to the character of that particular carrier and its proposed extensions, its construction, equipment, history, traffic and business, revenues, competition and effect on the national transportation system sought to be fostered and preserved by the Transportation Act.

This Court, in *Texas & Pacific R. Co. v. Gulf, C. & S. F. R. Co.*, 270 U. S. 266, has laid down the rule for the construction of the Transportation Act, in the light of the context of its language, and in the light of the purposes sought to be accomplished by that legislation and of the evils sought to be remedied. That rule for construction was there applied to the first part of the same sentence of paragraph (22), the last part of which is here in question.

The District Court below followed that decision. It said, referring to this Court's opinion in the *Texas & Pacific Case* (R. 451-453):

> "The Court in that case laid down the true guide for the construction of paragraph (22). It held that

the guide was to be found in the context in which the language was used and in the relation of the specific provisions to the railroad policy and legislative purpose introduced by the Transportation Act. If the Court in that case had 'stuck in the bark' of the particular word used, had given to that word in this exclusion provision a purely literal meaning, the track sought to be built by the Gulf, Colorado & Santa Fe would have been an 'industrial track' just as much as the defendant in this case would be an 'interurban electric railway' within a strictly literal interpretation of that expression.

"The Supreme Court, in the Texas & Pacific case, did not allow their interpretation of the meaning of 'industrial track' to be controlled by arguments based on the rulings of the Commission as to what were industrial tracks, or by the sense in which railroad companies had loosely employed this expression. If they had been guided by such considerations, they would assuredly have held that the proposed track of only seven and one half miles was an industrial track. But the Supreme Court expressly repudiated these considerations, and took as its guide the real purpose which the extension would serve. They held that it was not an industrial track, but a real extension for which a certificate had first to be procured from the Interstate Commerce Commission before construction would be allowed, because of the effect which this extension would have on the rival railroad companies."

After quoting from the opinion in the *Texas & Pacific Case*, the District Court further said (R. 453):

"Such is the construction placed upon one half of paragraph 22. It is only logical to apply the same construction to the remaining portions of the same paragraph, *noscitur a sociis*. Congress bracketed these phrases together and it would be highly illogical to apply one rule of construction to one phrase and a different rule to the other."

The District Court also followed this Court's decisions in *Wisconsin Railroad Commission v. Chi., B. & Q. R. Co.*, 257 U. S. 563, *New England Divisions Case*, 261 U. S. 184, *Dayton-Goose Creek Ry. v. United States*, 263 U. S. 456, in all of which this Court construed and interpreted the Transportation Act in the light of the evils sought to be remedied and the new legislative policy and purposes sought to be accomplished by that Act.

We think these decisions and that in the *Texas & Pacific Case* are controlling here and that this Court has already so fully laid down the controlling principles for interpreting and construing the Transportation Act as to make it unnecessary for it to take extraordinary direct jurisdiction of a particular case, such as this, involving application of the controlling principles to particular facts as to a particular carrier. Any case wherein is raised the question whether paragraph (18) or paragraph (22) applies to a particular electric railroad would be a case raising "an important question of Federal law" in exactly the same sense as is this.

Upon the facts found by the District Court, it is clear that the petitioner is a carrier of such national importance, and that its proposed extensions would have such an effect on the national system of transportation, as to be within the legislative purposes sought to be accomplished by paragraphs (18) to (21) and that those paragraphs must apply, unless, by the language used in the exclusion provision of paragraph (22) (an exception in a remedial statute, which exception must be strictly construed), Congress intended to exclude entirely from Federal regulation of extensions and abandonments all railroads motivated by electricity and owned and operated independently of any steam railroad. That would mean that the mere question of motive power, not the question of the effect on the national transportation system, was made the test of Federal jurisdiction over extensions and abandonments. It would

impute to Congress an intention to discriminate against steam, and in favor of electric railroads.

It is not conceivable that any extension of any independent interstate electric freight carrying railroad could come within the inhibitions of paragraph (18) if the proposed extensions of the petitioner do not.

Petitioner makes in its brief (pp. 17-19) an appealing suggestion of the difficulties under which officials of an electric carrier, such as it is, may labor, in view of the criminal provisions of the statute, in determining whether such carrier is within paragraph (22). The sufficient answer to this would seem to be that no criminal proceedings have been brought against petitioner's officials, or are here involved. If they were brought, then would be time enough to determine whether the sections of the statute contain sufficient definition to meet the requirements of the criminal law.

In the meantime, petitioner and its officers cannot well be misled as to its probable status. The Commission has decided that it is within paragraph (18), 138 I. C. C. 363. A court of three judges, although in a case of which it did not have jurisdiction, has decided the same way in a carefully considered opinion, 30 F. (2d) 421. The court below has made the same decision and has enjoined threatened violations of paragraph (18). It is hardly thinkable, under the circumstances, that petitioner's officers should fall into a course of conduct which would subject them to criminal prosecution under either paragraph (18) or Section 20a, covering issuance of securities.

## II.

**The District Court gave consideration to the context of those provisions of the Interstate Commerce Act, as amended by Transportation Act, 1920, in which the term "interurban electric railways" appears.**

The petitioner's brief asserts that no consideration was given by the District Court to the context of other pro-

visions of the Act using the term "interurban electric railways" in different connections and sometimes with different modification, Section 15a, Section 204 (49 U. S. C. 73), Section 209 (49 U. S. C. 77). This assertion is evidently made because the opinion below does not discuss these other provisions.

But the opinion below made the same decision, upon the same grounds, as the decision by the three judge court in its opinion in the former suit under the Urgent Deficiencies Act, and expressly referred to and followed that opinion. It said (R. 450):

> "But all of these cases are referred to and discussed in the previous opinion by the three-judge court, which is reported in 30 F. (2d), at pages 429, 430 and 431. This opinion, going over the same ground, and deciding the same question in the same way, admittedly tracks the former decision of the three judges, both in view of the law and in statement of the evidence."

And the opinion of the three judges, Soper, District Judge, writing, in the same District Court, gave detailed consideration to the argument of petitioner, there also made, based on the comparison of the varying uses of the term in the various sections of the Act. In that opinion, 30 F. (2d) 421, 432, 433, the court set out all the other provisions referring to electric railroads in a foot note. And, after comparison of the different provisions, that court said:

> "It is apparent from these enactments that the carrier described by Congress as an interurban electric railway is one which may have one or more of the following characteristics: (1) It may be operated as part of a general steam railroad system of transportation; (2) It may have as its principal source of operating revenue, passenger traffic or sale of power, heat and light; (3) It may have as its principal source

of operating revenue, freight traffic; (4) It may be engaged in the general transportation of freight; (5) It may make through traffic arrangements with steam railroads and thereby increase its freight business.

"Moreover, it is clear that engagement by an interurban electric railway in the general transportation of freight does not of itself bring the carrier within the jurisdiction of the Commission over the construction and extension of railroad lines. No other conclusion can fairly be drawn from the fact that an interurban electric railway, engaged in the general transportation of freight, is kept within the rate making power given to the Commission by Section 15a, but such a carrier is not mentioned at all in the exception set out in Paragraph 22 of Section 1. Hence the petitioner, bearing in mind that the Piedmont & Northern performs the service of an interurban electric railway and engages in the general transportation of freight, contends that the railroad is within the exception of Paragraph 22 and is at liberty to extend its lines without the Commission's consent. But these considerations do not necessarily lead to the conclusion sought to be reached. It is true that an interurban carrier may be entitled to that descriptive name although it participates in general freight traffic; but it does not follow that every electric carrier, so engaged, is an interurban railroad. Freight traffic may be limited in extent and within the scope of a carrier devoted primarily to local business, and at the same time, be general in its nature. The carrier may transport the kinds of property usually carried by steam roads in addition to the carriage of baggage, mail and express, and yet be so restricted in its operations that it may not be properly classified with general steam carriers whose operations cover a wide field. See the discussion in Lackawanna & Wyoming Valley Ry., 105 I. C. C. 178.

"The difference in language between the exception in Section 15a and the exception in Section 1, Paragraph 22, may not be ignored, but it is accounted for by the fact that in one case Congress was dealing with

rates, and in the other, with the construction of new lines. It evidently concluded that if an electric interurban road should build up a business of transporting property to such an extent as to be engaged in the general transportation of freight, it should be included in the general rate adjustment provided in Section 15a with a view to uniformity of rates and the connection of the carrier with steam railroads. On the other hand, Congress was of the opinion that so long as an electric carrier should remain independent of steam railroads in its operation and control, and should be engaged in the local carriage of passengers and freight, as its primary business, the extension of its line would remain a matter of local concern and should be left to the regulation of local authority. It is obviously difficult to form an exact definition of the term under discussion and to say when the general freight business of an electric railway has become so great that it has crossed the line between an interurban railroad, engaged in the general transportation of freight, and a general carrier subject to the provisions of the statute. But there is no difficulty in the case at bar in determining that the Piedmont & Northern has ceased to be primarily an interurban railroad. If any line of demarcation is to be drawn there can be no doubt that a railroad, 92 per cent of whose traffic comes from the general transportation of freight, and 95 per cent of whose freight traffic is interchanged with carriers connecting it with all parts of the United States, is to be placed in the same category as a general steam railroad."

It would have been repetition for the District Court in the opinion below to have said the same thing. It did so by reference. We submit that the above quotation is entirely sound. Giving the fullest significance to the differences in the use of the term "interurban electric railways" in the different sections of the statute, such consideration still falls far short of the conclusion that such a carrier as petitioner, having such business as is shown on the record here, is free to build extensions of the national sig-

nificance of those here enjoined, without certificate authority from the Commission.

That the District Court gave full and careful consideration to the argument of petitioner based on comparison of the different references to "interurban electric railways" in the various sections of the Act would seem to be conclusively demonstrated also by the fact that the court filed with the opinion, as an explanatory "note" the elaborate brief filed by counsel for the petitioner, covering the legislative history of the various sections. (R. 458-486.)

Referring to this "note," the court said in its opinion (R. 455):

> "In a note filed along with this opinion, we make definite reference to the proceedings referred to in this part of our opinion. See attached note under separate cover."

## III.

**No conflict is apparent between the decision of the District Court below and the decisions of this Court in Omaha & C. B. Street R. Co. v. Interstate Commerce Commission, 230 U. S. 324, and United States v. Village of Hubbard, 266 U. S. 474.**

In neither the *Omaha Street Railway Case* nor the *Village of Hubbard Case* did this Court undertake to draw the line of distinction between interurban electric railways and electric railroads which are more than interurbans and are in the same category as to business and effect on national commerce as interstate steam railroads.

The *Omaha Street Railway Case* was decided years before the enactment of Transportation Act, 1920, to-wit on June 9, 1913. It drew the line of distinction between street railways, which were not subject to any regulation by the Interstate Commerce Commission, and electric railroads, which were subject to its regulation as being "railroads" engaged in interstate commerce. The specific holding was

that a street railway, built in streets and not on private right of way, having no power of eminent domain, and engaging in, and authorized to engage in, no freight carriage, but doing only a passenger business, was not a "railroad" as that term was used in the Act to Regulate Commerce and hence was not subject to Federal regulation even though it carried passengers on street cars across a state line.

In holding that, this Court merely distinguished such a street railway from interurban railways with electric motive power which are "railroads" and, as such, subject to the Act to Regulate Commerce if engaged in interstate commerce. No attempt was made to draw the line within the general class of electric "railroads" subject to Federal regulation, distinguishing between those properly classed as "interurbans" and those outside such class.

The *Village of Hubbard Case* was decided after the passage of the Transportation Act, to-wit on January 5, 1925. But there again this Court did not attempt to draw the line of demarcation between electric railroads properly classed as "interurban electric railways" and electric railroads which cannot properly be so classed under the provisions of the Transportation Act.

The precise holding there was that the Interstate Commerce Commission had jurisdiction, under the Act of 1887 to Regulate Commerce, to prevent discrimination against interstate commerce by an interurban electric railroad even though not engaged in the general transportation of freight. There again the court simply gave its attention to the line of distinction between street railways, not subject to Federal regulation at all, and interurban electric railways which are subject to Federal regulation.

The court did there comment, in support of its holding that the Commission had power to regulate interurbans, on the different provisions of the Transportation Act referring to interurbans, *as negativing an intention to exclude such carriers from Federal regulation.* There was

no attempt to draw the line here involved, within the general class of electric railroads subject to Federal regulation, between those railroads properly classed as "interurban electric railways" within the various inclusion and exclusion provisions, on the one hand, and, on the other, electric railroads properly in the same category for regulation as steam railroads and hence not within the class of "interurban electric railways," excluded by some provisions of the Transportation Act from, and included by other provisions in, specific regulatory powers of the Commission.

Nothing that was said in either of those cases intimated that an electrically operated freight carrying railroad of the scope, competitive power, and national importance of the Piedmont & Northern, as shown by the findings on this record, is free from Federal regulation of extensions as being an "interurban electric railway" within the meaning of paragraph (22) of Section 1 of the Act.

The opinion of the court of three judges in the former suit discussed those two decisions fully and distinguished the present question. 30 F. (2d) 421, 432-434. We see no probable or possible conflict between those decisions of this Court and the decision below here.

## IV.

**The opinion of this Court in the case of Texas & P. R. Co. v. Gulf, C. & S. F. R. Co. 270 U. S. 266, is controlling of the question here. The District Court could not have decided the question otherwise than it did under that case and its doctrine was not extended beyond its necessary results.**

The decision of this Court in the *Texas & Pacific Case* did not turn on the expression "located wholly within one state" as used in paragraph (22). The trackage involved in that case would have been located wholly within one state. If the decision had turned on that language, it would have been the other way, that no certificate of the Interstate Commerce Commission was required.

So that decision cannot be distinguished, as petitioner attempts to distinguish it, on the theory that the words "located wholly within one state" in paragraph (22) modify only "spur, industrial, team, switching or side tracks," and not "or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation," and that to that extent those words constitute a difference in treatment between spur, industrial, etc., tracks and interurban electric railways, etc. This Court's decision did not turn on such distinction, if its exists, since the trackage there involved was wholly within one state. The District Court's decision below did not turn on either the recognition or rejection of such distinction. And the extensions of the petitioner here enjoined would not be located within one state. They would be interstate extensions.

The question in the *Texas & Pacific Case* was whether the trackage there involved, admittedly to be wholly within one state, was properly to be considered as a "spur" or "industrial" track within the meaning of paragraph (22), which the carrier could construct without certificate, or whether it was an extension of line requiring certificate authority under paragraph (18).

That question is entirely analogous to the question here. The exclusion of spur, industrial, etc., tracks is a part of the same sentence as the exclusion of "street, suburban, or interurban electric railways," etc. Manifestly the same *rationale* for exclusion applied to both. This Court there applied two tests for construing the exclusion language of paragraph (22): (1) Construction in the light of the context; (2) Construction in the light of the evils sought to be remedied and the legislative purposes sought to be accomplished by the Transportation Act.

A third applicable rule of construction was enounced by this Court in *Spokane-Inland Empire R. Co. v. United States*, 241 U. S. 344: that the remedial part of a remedial

statute should be liberally construed and, by the same token, that exceptions in a remedial statute should be strictly construed, because such construction is equally necessary to give effect to the remedial purposes of the legislation.

The court below followed these three rules of construction and it could have reached the opposite result only by repudiating them all.

The trackage involved in the *Texas & Pacific Case* was only seven and a half miles, to be located in one state, and the anticipated revenues to be gained by the Santa Fe and diverted from the Texas & Pacific amounted to around $500,000.00 a year, 270 U. S. 266, 276. And the trackage would have served only a particular group of industries. It came literally within definitions of "industrial tracks" by the commissions, and by the courts, made in other connections, and within that term as loosely used by railroads. But this Court held the trackage would not be a spur or industrial track within the meaning of paragraph (22), construed in the light of the context and of the remedial purposes of the Act.

Here we are concerned with proposed extensions of a total of 128 miles, one across a state line, which would create a continuous interstate line of railroad of 255.89 miles (R. 424, finding VI, 1), predominantly engaged in interstate freight traffic of national importance, and the effect of which extensions would be a diversion of millions of dollars of interstate freight traffic revenues from the principal trunk lines of the territory, except the one having a preferential agreement with the petitioner, and the creation of a new effective trunk line of connecting carriers north and south throughout the southeast.

These extensions, if permitted, would transform the transportation system in the southeast and would have an extensive effect on the national transportation system.

Not only did the District Court not extend the decision by this Court in the *Texas & Pacific Case*, but that deci-

sion applies and controls here *a fortiori* as to all the reasoning upon which it was grounded.

Petitioner argues on brief (pp. 27-28) that the decision below does not contain sufficient definition to enable a company, proposing after the Transportation Act to build an entire new line of electric railroad, to determine whether it would have to secure a certificate from the Commission or whether its projected railroad would be an "interurban electric railway" within the exemption of paragraph (22). That might be a difficult question to determine. It might conceivably need to await determination until the new road's business, character and effect could be determined. Or the company might have to act at its peril.

But, like the suggested possibility of criminal prosecutions, it is not the question raised here. The petitioner's lines have been in operation for years. Its character, its business, its relation to national transportation and to the legislative purposes of the Transportation Act are known. The effect of its proposed extensions is demonstrable and demonstrated without contradiction.

Either the petitioner must secure a certificate before it, having the character and business shown, can build extensions of the character and effect shown by the record, or Congress so used language in paragraph (22) as that any electric railroad not owned or operated by a steam railroad, no matter how national its scope and effect, is free to extend as far as it likes without certificate under Federal authority.

## V.

### The decision below is also in accord with decisions of the Commission and of other courts.

The decision below is in accord with the decisions by the Commission in: *Proposed Control of Sacramento-Northern Railway by W. P. R. Co.*, 71 I. C. C. 653, and *Piedmont & Northern's Application for Certificate*, 138 I. C. C. 368.

It is in accord with court decisions in the following cases: *Detroit & M. Ry. Co. v. Boyne City, G. & A. R. Co.*, 286 Fed. 540; *Pennsylvania Railroad Co. v. United States*, 40 F. (2d) 921; and *Piedmont & Northern Railway Co. v. United States of America*, 30 F. (2d) 421.

## CONCLUSION.

The decision below is correct. There is no conflict of decisions. It would seem that the petition should be denied. If this Court takes jurisdiction at this stage, the decision below should be affirmed on the merits.

Respectfully submitted,

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## APPENDIX.

### Statutes Involved.

Section 1, paragraphs (18) to (22) of the Interstate Commerce Act as amended by Transportation Act, 1920, 49 U. S. C. 1 (18) to (22):

(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in

each county in or through which said line of railroad is constructed or operates.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative, without complaint, authorize or require by order any carrier by railroad subject to this Act, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this Act, and to extend its line or lines: *Provided*, That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and neces-

sity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this Act which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

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CHARLES ELMORE

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1931.

No. 664.

PIEDMONT & NORTHERN RAILWAY COMPANY, *Petitioner*,

v.

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## SUPPLEMENTAL BRIEF OF RESPONDENTS, OTHER THAN THE INTERSTATE COMMERCE COMMISSION, IN ANSWER TO PETITIONER'S "ADDENDUM TO SUPPLEMENTAL BRIEF."

S. R. PRINCE,
F. B. GRIER,
CARL H. DAVIS,
WILLIAM C. BURGER,
JAMES J. McLAUGHLIN,
SIDNEY S. ALDERMAN,
*Solicitors for said Respondents.*

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---

## SUPPLEMENTAL BRIEF OF RESPONDENTS, OTHER THAN THE INTERSTATE COMMERCE COMMISSION, IN ANSWER TO PETITIONER'S "ADDENDUM TO SUPPLEMENTAL BRIEF."

---

Petitioner has re-filed its Supplemental Brief with an Addendum calling attention to the recent decision by the District Court for the Northern District of Illinois in the case of *United States v. Chicago, North Shore & Milwaukee R. Co.*, a case arising under section 20a, as to securities issue.

That decision stands alone, as the only decision of a federal court, save the reversed decision by the Circuit Court of Appeals in the *Texas & Pacific Case*, 4 F. (2d) 904, which approaches the question of construction from the viewpoint of stressing the strictly literal words of the exception as controlling the intent of the remedial provisions. It, therefore, merits brief consideration.

That court did not render an opinion to enlighten as to its reasoning. We have only its findings of fact and conclusions of law, copy of which petitioner attaches as an appendix to its additional brief.

District Judge Woodward's conclusions of law are broader than the case before him required. His question was whether the Chicago, North Shore & Milwaukee, upon the facts shown and found, was an "interurban electric railway, which is not operated as a part of a general steam railroad system of transportation," within the meaning of paragraph (1) of section 20a. He did not confine his conclusion of law to the holding that it was, but went much further and concluded that:

> "The letter, as well as the spirit of the Interstate Commerce Act as amended by Transportation Act, 1920, clearly excludes from section 20a of the Interstate Commerce Act, and from other sections thereof, *independently operated electric railways* * * *" (Italics ours.)

Only section 20a was before that court for construction. The conclusion is *obiter* as to other sections.

To dismiss the bill of complaint before it, it was not necessary for that Court to announce the broad conclusion that all independent electric railways are excluded from Commission authority under section 20a. To the extent that that conclusion went beyond the exigencies of the particular case, it is *obiter*.

On the facts, that case is sharply distinguishable from this. To say the least, the Chicago, North Shore & Mil-

waukee is close to the "interurban" border line, whereas the Piedmont & Northern is far from the border line. It could well be concluded that the North Shore is essentially and predominantly an interurban, engaged in an interurban business, without concluding that Congress by "interurban electric railways" meant to describe all independently operated electric railroads. But the Piedmont & Northern cannot be held to be within that term unless all independent electric railways are free to extend or abandon without certificate.

The North Shore, as shown by the Court's findings, is predominantly devoted to the business of a "between city" service, between Chicago and Milwaukee and cities between. It operates regular elevated, rapid transit lines in Chicago of 16 miles and jointly operates with a rapid transit company over 8 miles of elevated tracks through Chicago and Evanston to Wilmette. It operates an interurban "Shore Line." Its interstate line runs to Milwaukee and over street car lines in that city, over which it has ordinance authority to operate only "its interurban cars." Its "Libertyville Branch" appears to be a suburban line. Its "Waukegan Branch" runs from North Chicago Junction 3.29 miles to Waukegan and there is the only street car line, performing all urban service. That line engages in an "interurban express" business and an urban street railway business.

Of the total trackage of the company, 14.66 per centum is street railway trackage. Much of its rail, frog and switch equipment is special street railway type. It uses cross-over tracks over which its main line trains operate but over which steam trains could not operate.

It operates a ferry truck service of container cars hauled by tractors. Less than carload merchandise is handled in baggage cars, motored and trailer, of small capacity as compared with steam railroad freight cars. It has motor merchandise dispatch type refrigerator cars. Nearly

half of its freight cars are too light in construction to be interchanged with steam railroads.

Its predominant business is interurban passenger service. Ninety-six per centum of its passenger business is local. Passenger service produces 78 per centum of its total revenues. The principal part of the 22 per centum of its business which is merchandise carriage is "merchandise despatch service performed in baggage type cars." Only 8.47 per centum of its total revenues comes from transportation of interline freight. Compare Piedmont & Northern, 94.5 per centum of whose total revenues come from freight, of which 95.7 per centum is from interline interchange and 80.7 per centum from interstate freight. (R. 417-418.)

It is impossible for the North Shore to handle carload freight in standard freight equipment on 31.47 route miles, or 22.73 per centum, of its total mileage. The Piedmont & Northern handles such equipment on every mile of its lines. (R. 412.)

There is no finding that the North Shore hauls long trains of freight cars. The Piedmont & Northern hauls solid trains of as many as 65 freight cars. (R. 413.)

The North Shore operates through cities under ordinance restrictions requiring safety stops, stops at intersections, lighting streets and crossings, paving and sprinkling streets and removing snow. In 6 towns it is prohibited from handling freight. It pays a $50.00 license fee to Chicago for every car operated over the elevated railway.

Manifestly the predominant business of the North Shore is wholly different from that of the Piedmont & Northern. It may well be classed as an "interurban" without any analogous inference that the Piedmont & Northern is such. Classified according to predominant business, it would fall in a wholly different category from the Piedmont & Northern.

The facts as to the North Shore's business are summed up by Judge Woodward's finding that, "Respondent performs a street car service, a suburban service and an interurban service."

The facts as to the Piedment & Northern's business are summed up in Judge Glenn's finding (R. 423-424) that it is predominantly engaged in the same essential interchange, interstate business as the steam freight carriers of the territory and that its purely local or interurban business is inconsequential.

Again, it appears that Judge Woodward gave great consideration to the argument of inconvenience. He pointed out that the North Shore and its predecessor had issued $61,662,600.00 par value of bonds since the passage of the Transportation Act, all issued under authority of state commissions, and that $38,935,608.07 of such securities issued under state authority alone were outstanding, all of which securities would have been manifestly void if section 20a applied. He found that $239,000,000.00 par value of securities have been issued by electric railroads reporting to the Commission, other than the North Shore, since the passage of the Transportation Act, without certificate of the Interstate Commerce Commission under section 20a.

Plainly the fact that railroads subject to 20a may have issued even large amounts of securities in violation thereof cannot be a proper basis for a conclusion that they are not, therefore, subject to the section. This is altogether an argument *ab inconvenienti*.

*But no such argument applies to the Piedmont & Northern. It has issued no securities since 1914.* (R. 409-410, finding 16.)

It is inevitable that every case must stand on its own facts, and be determined by the gradual process of judicial inclusion and exclusion, as to whether a particular electric railroad is subject to or free from regulation under paragraph (18) and section 20a, unless it is to be held that

the word "interurban" in the exceptions is surplusage and that Congress excluded what it did not say it excluded, *i. e.*, all independent electric railroads.

In its addendum to its Supplemental Brief, p. 19, petitioner weakens on its own doctrine. It says:

> "Petitioner does not argue that a transcontinental steam railroad, or a steam railroad engaged in the long haul of heavy load traffic and the operation of through passenger trains between widely separated sections of the country, would merely by abolishing steam and adopting electricity as a motive power become an interurban electric railway."

Why not? It would be an independent electric railroad operating between cities. And it is the whole thesis of petitioner that paragraph (22) exempted all independent electric railroads operating between cities.

Petitioner now admits that a line must be drawn somewhere. A line can only be marked out on the doctrine declared by the District Court below and by the decisions of this Court cited on our main brief. And unless a line is to be drawn, any independent steam railroad, by wholly electrifying its line, would automatically become an independent electric railroad operating between cities and exempt by paragraph (22), if petitioner's theory of this case be sound.

We submit that the decision in the *North Shore Case* is no support for petitioner's position here.

Respectfully submitted,

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*Carolina, Clinchfield & Ohio Railway of South Carolina,* and
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## BRIEF FOR THE RESPONDENTS, OTHER THAN THE INTERSTATE COMMERCE COMMISSION.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1931.

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No. 664.

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PIEDMONT & NORTHERN RAILWAY COMPANY, *Petitioner*,

*v.*

INTERSTATE COMMERCE COMMISSION, SOUTHERN RAILWAY COMPANY, CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY, ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, CAROLINA, CLINCHFIELD & OHIO RAILWAY, CAROLINA, CLINCHFIELD & OHIO RAILWAY OF SOUTH CAROLINA, AND CLINCHFIELD NORTHERN RAILWAY OF KENTUCKY, *Respondents*.

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## BRIEF ON BEHALF OF RESPONDENTS OTHER THAN THE INTERSTATE COMMERCE COMMISSION, THE STEAM RAILROAD INTERVENERS.

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### STATEMENT OF THE CASE.

This was an equity suit brought by the Interstate Commerce Commission against petitioner under section 1, paragraph (20), of the Interstate Commerce Act as amended, 24 Stat. L. 379, 41 Stat. L. 478; 49 U. S. C. 1, par. (20),

and under Judicial Code, section 24, 28 U. S. C. 41, par. 8 (R. 2), to enjoin petitioner, admittedly an interstate carrier by railroad subject in general to the Interstate Commerce Act as amended (R. 2, 3, 59-60), from constructing threatened extensions of its lines of railroad, without having first obtained from the Commission a certificate of public convenience and necessity under the provisions of section 1, paragraphs (18) to (21) of said Interstate Commerce Act as amended (R. 71-72).

These respondents, competing steam railroads of the territory, intervened as plaintiffs (R. 73-88) and as "parties in interest" under section 1, par. (20). Their intervention was allowed. (R. 89.)

Petitioner, defendant below, admitted that it had applied to the Commission for certificate authorizing the extensions, but with reservation asserting that the Commission was without jurisdiction, and that the Commission, after full hearing, held that it had jurisdiction, found that the present or future public convenience and necessity had not been shown to require the construction of the extensions, and denied the certificate. (R. 60-61.) (See 138 I. C. C. 363.)

It admitted that at the time of the institution of this suit it was actually engaged in the extension construction, without certificate of public convenience and necessity, and with intention to engage in interstate transportation over the extended line of railroad. (R. 61-62.)

The answers (R. 59, 93, 98), as defense to the bill and the bill of intervention, asserted that defendant was free to build the threatened extensions without certificate of the Commission on two asserted grounds:

1. That the extensions had been "undertaken" by it, within the meaning of section 1, par. (18), of such Act, prior to the effective date of said paragraph; and,

2. That it was "an interurban electric railway which is not operated as a part or parts of a general steam rail-

road system of transportation," within the meaning of the exception of section 1, par. (22), of said Act, and that the threatened extensions would be extensions exempted by that paragraph.

On final hearing, the court below held (R. 435-457) that defendant had not undertaken its extensions prior to the effective date of paragraph (18). No error is assigned to this holding (R. 493-502) and the petitioner has abandoned its contention in this regard on this appeal, by assigning no error to this holding, on its petition for certiorari, and on brief.

The District Court further held that petitioner was not "an interurban electric railway which is not operated as a part or parts of a general steam railroad system of transportation," within the meaning of section 1, par. (22), and that its threatened extensions would not be extensions excepted by that paragraph, but would be extensions, the construction of which without certificate is forbidden by section 1, paragraphs (18) to (20), and is subject to be enjoined as matter of law under paragraph (20), at the suit of the Commission and of the intervening steam railroads as parties in interest. (R. 433-434, 447-457.)

The final decree permanently enjoined further prosecution of the extensions without certificate. (R. 487.)

In 1927, petitioner had determined to build these extensions, one an interstate extension of 53 miles from Spartanburg, S. C., to Gastonia, N. C., connecting its present line in South Carolina with its present line in North Carolina, and another of 75 miles, from Charlotte, N. C., the present northern terminus of its North Carolina line, to Winston-Salem, N. C. These extensions would effectuate a continuous interstate line of railroad of petitioner 255.89 miles long from Greenwood, S. C., and a connection there with the interstate Georgia and Florida, to Winston-Salem, N. C., and a connection there with the interstate Norfolk and Western system, and connections with several other steam railroad systems at various points. (R. 125,

424, 432.) See the statement of this Court in *Piedmont & Northern Ry. Co. v. United States,* 280 U. S. 469.

The Commission, learning informally of the project, advised petitioner by letter of March 8, 1927, that before constructing any extension or issuing any securities it would be expected to file applications for authority under sections 1 and 20a, but that such applications would be without prejudice to its right to assert that the Commission had no jurisdiction and to adduce evidence to support such contention, referring to the procedure outlined in *Texas & Pacific R. Co. v. Gulf, C. & S. F. R. R. Co.,* 270 U. S. 266, 272. (R. 393-394, exhibit 109.)

Thereupon, on March 26, 1927, petitioner filed with the Commission its application for certificate of public convenience and necessity for the construction of the two extensions here involved, moving to dismiss its own application for alleged want of jurisdiction of the Commission on the same two grounds asserted in its answers in this suit. (R. 124, exhibit 2, R. 432.) These respondents intervened in opposition to the application. The Commission overruled the motion; took jurisdiction; held hearings and arguments; and, on April 3, 1928, denied the application on its merits. *Proposed Construction of Lines by Piedmont & Northern Ry. Co.,* 138 I. C. C. 363. (R. 6-58, 432.)

Petitioner then, on May 22, 1928, brought suit in the District Court below, under the Urgent Deficiencies Act, 28 U. S. C. 47, to annul, enjoin, and set aside the order of the Commission, asserting that the Commission was without jurisdiction on the same two grounds asserted before the Commission and asserted below in the answers in this suit. The Commission and these respondents intervened as defendants. The Commission moved to dismiss the bill for want of jurisdiction of the court on the ground that the order denying the certificate was a negative order, not subject to review by such suit. The court, three judges sitting, denied the motion, and, upon final hearing, dismissed the bill on its merits, holding against petitioner,

plaintiff there, on both grounds on which it asserted the Commission to have been without jurisdiction. *Piedmont & Northern Ry. Co. v. United States,* 30 F. (2d) 421.

On direct appeal by the plaintiff to this Court it was held that the trial court was without jurisdiction of the suit, the order of the Commission being negative, and this Court, without passing upon the merits, reversed because the District Court had dismissed the bill on the merits and with direction to dismiss the bill for want of jurisdiction of the court. *Piedmont & Northern Ry. Co. v. United States,* 280 U. S. 469.

After this Court rendered that opinion, the opinion was read to the Board of Directors of petitioner at a meeting on March 10, 1930, and the Board thereupon adopted resolutions reaffirming the intention and plan to build both extensions and authorizing its officers to proceed toward completion of the extensions by beginning and prosecuting actual construction on the interstate connecting link from Spartanburg, S. C., to Gastonia, N. C. (R. 122-124.) Petitioner's President, by letter of March 11, 1930, to the Chairman of the Commission, advised that construction work had begun, explained that this seemed the only way, under this Court's decision, to assert his company's conception of its legal rights, and enclosed certified copy of the Board's resolutions of March 10, 1930. (R. 385-386.) That precipitated the present suit, bill in which was filed April 16, 1930, in the same District Court. (R. 1.)

In its opinion in the former suit, this Court said, "It is true that if the railway builds without having secured certificate, it may suffer serious loss. For a court may hold, in an appropriate proceeding, that the railway is within the purview of paragraph 18." Admittedly, this suit is "the appropriate proceeding" referred to by this Court, and in it the court below has held that petitioner "is within the purview of paragraph 18" and has enjoined its threatened extensions pursuant to paragraph (20).

No other penalty of that paragraph has been invoked against petitioner.

Petitioner appealed from the decree below to the Circuit Court of Appeals for the Fourth Circuit, and this Court granted certiorari to review the cause prior to the determination thereof by the Circuit Court of Appeals.

In determining the correctness of the decision below, holding petitioner's railroad lines and its proposed extensions thereof to be within the purview of paragraph (18), and not within the immunity of paragraph (22), it is, of course, necessary to consider not only the character of petitioner's present lines and of the railroad business it has done and is doing over those lines, but also the character, scope, and purpose of its enjoined extensions, the business expected and intended to be done over the extended lines if the extensions should be built, the traffic territory not previously served by petitioner which would be invaded by the extensions, the resulting competition and injury to be suffered by the interstate steam railroads now serving that territory, and the effect on transportation of national importance and on the national system of transportation. *Texas & Pacific R. Co. v. Gulf, C. & S. F. R. Co.*, 270 U. S. 266; *Texas & New Orleans R. Co. v. Northside Belt Ry. Co.*, 276 U. S. 475; *Western Pacific California R. Co. v. Southern P. Co.*, decided November 23, 1931, 76 L. Ed. (adv.) 120.

The District Court, in compliance with Equity Rule 70½, found the facts specially (R. 402-433) and stated separately its conclusions of law therein (R. 433-435). There is no substantial challenge to the facts as found by the District Court in the assignments of error; and the petition for certiorari, the supporting brief, and the supplemental brief of petitioner in no wise challenge the facts as found by the District Court. These facts will accordingly be accepted and this Court may take them as admitted without exploring the evidence. However, any in-

cursion into the voluminous evidence will abundantly support the facts as found below.

The facts particularly important to the question here raised, as to the character of petitioner's lines of railroad, the business done thereby, and as to the character of the enjoined extensions, the business to be done thereby, and the effect thereof, will be found in the District Court's findings on pages 404-405, 411-425, of the record.

On the brief of these respondents in opposition to petition for certiorari, pages 4-14, we gave a somewhat condensed statement of these findings of fact, to which reference is hereby made. These undisputed facts may be summarized, with further condensation, as follows:

Petitioner is incorporated as a standard railroad, not as a street, suburban, or interurban railroad, and has all the powers of a railroad and power to operate by any motive power it may choose.. (R. 403.)

It operates on private right of way and around cities, except for 2.25 per cent of its mileage which is in streets. (R. 404.)

It was built pursuant to an ambitious plan to furnish important interstate freight carriage for the industrial piedmont sections of North and South Carolina. (R. 404-405.) Its main original purpose was to tap important industrial traffic concentrations in both states, to provide a preferred connection to the Seaboard giving that system access to these concentrations which it had not previously had, and this purpose was effectuated by the contract with the Seaboard. (R. 405-407.) The result was substantial diversion of important interstate traffic from the respondents to new joint through routes over petitioner and Seaboard and its connections (R. 406-407, 419-420) and this effect has continued to the present (R. 418-419).

Petitioner is built as a standard railroad on steam railroad standards. (R. 411-412.) Its extensions are planned on even higher standard to carry more heavy freight traffic. (R. 412.)

Its freight carrying equipment is steam railroad equipment and moves in interchange all over the United States. Foreign line equipment from the entire country moves over petitioner's lines constantly. Eighty five per cent of its expenditure for equipment has been for freight carrying equipment. It has terminal facilities of steam railroad standard and joint terminals with steam roads. It draws freight trains of from 40 to 65 cars. (R. 412-413.)

Its local passenger business is handled like what is ordinarily known as interurban passenger business but it has invaded the national field even as to passenger business, selling through tickets and checking baggage to points all over the country and to Cuba. (R. 413-414.)

Its operating methods in handling freight are indistinguishable from methods of the interstate steam railroads, except as to differences in detail purely incident to electricity as motive power. It operates daily freight package car service from points in distant states in connection with steam roads and ocean steamship lines. (R. 414-415.)

Its methods of traffic solicitation, memberships in steam railroad traffic organizations, and its tariffs are similar in character to those of the interstate steam carriers and are national in scope. Its tariff changes affect rates of carriers all over the country. (R. 415-416.)

Its freight revenues have relatively increased until they are 94.5 per cent of its total revenues. (R. 416-417.) Of its freight revenues 95.7 per cent are from interline interchange and only 4.3 per cent from local freight. Passenger revenues are inconsequential and 97.8 per cent thereof are local. (R. 417-418.)

Since 1916 it has been a Class I interstate carrier with operating revenues over a million dollars annually. Since 1923, its operating revenues have exceeded two million annually. For 1929 its total revenues were $2,451,993.34, of which $2,317,528.77 were from freight, and 80.7 per cent of which freight revenues were from interstate freight. (R. 418.) It interchanges an average of 6,000

cars of freight a month moving to and from points all over the United States and Canada and Mexico. (R. 419.)

It is now an important link in joint through routes of the southeast and if the extensions were built it would become an important link in new joint through routes establishing a new effective trunk line of connecting carriers of national scope and importance. (R. 420-421.)

The effect of its extensions would be a gain to it of nearly four ~~five~~ million dollars of interstate freight revenues the first year, increasing yearly at a rate of about 8 per cent., and a corresponding diversion from these respondents of at least twice these revenues to their irreparable injury. (R. 421-422.)

Its extensions would make a new route from coal fields and would seriously injure a new line of the Louisville & Nashville built under authority of Commission certificate. (R. 422.)

It is owned and controlled by great electric power interests who are large freight shippers of the territory and control much freight traffic of others, which traffic is thus removed from competition and delivered by control to petitioner, to Durham & Southern, an interstate steam railroad owned by substantially the same interests, and to the preferred connection of both, the Seaboard. (R. 422-423.)

Petitioner is engaged in the same essential business as these respondents. That part of its business which is local and "interurban" in character is wholly inconsequential. Its enjoined extensions propose to add to its national, not to its local, business. It is an important part of the national steam railroad system of transportation sought to be fostered and preserved by the Transportation Act. (R. 423-424.)

Yet it asserts absolute freedom to extend *ad libitum* without federal authority or regulation, on the theory that it is a "street, suburban or interurban electric railway,

which is not operated as a part or parts of a general steam railroad system of transportation."

The record is entirely clear that petitioner, as the predominant part and practically the whole of its business, is engaged, and if extended as threatened would be much more heavily engaged, in an interstate freight business of national scope and importance, of exactly the same character as that done by these respondents, steam railroads of the territory. The only substantial distinction between petitioner and steam railroads, such as these respondents, is that it uses electricity for motive power and they use steam. All the differences in construction, equipment and operation are purely incidental to electric motivation, and petitioner has express charter power to use steam for motive power. (R. 403.) If it could extend without certificate, it could at once change to steam operation and accomplish by indirection what no steam interstate carrier could do under the law.

If petitioner is free to build the enjoined extensions without the Commission's certificate under paragraph (18) then any interstate railroad operated by electricity, if owned and operated independently of any steam railroad, could build without federal authority any extensions it might desire—could build a railroad system across the continent.

Petitioner stresses the alleged peculiar adaptability of electric motivation to interurban service: frequent stops, light and short trains, smallness and frequency of passenger units, etc., as distinguishing it from steam railroads subject to paragraph (18). But the whole of its local freight and passenger business constitutes so small a part of its entire business as to be inconsiderable. Its main business is interstate, interchange freight, national in scope, moving throughout the United States, and even to and from Canada and Mexico, and of a character exactly similar to the business of these respondents, all of which also do a local interurban business in the carriage

of passengers and freight similar to the small business of that character done by petitioner.

If such a railroad is immune from federal regulation and is free to build such extensions as those here enjoined, without Commission certificate under paragraph (18), and, indeed, in the face of denial of said certificate on Commission finding that public convenience and necessity do not require these extensions, then certainly Congress has, by inartificial choice of language, failed to accomplish the purposes which every one recognizes it sought to accomplish by the passage of the Transportation Act. It would take a most forced and strained construction of the exception or proviso contained in this highly remedial statute to arrive at such a conclusion.

## THE QUESTION INVOLVED.

The petition for certiorari, and petitioner's briefs, bring the case down to a narrow compass, the question involved being accurately stated on page 6 of petitioner's supplemental brief.

That question necessarily falls apart in two branches:

1. Is petitioner "an interurban electric railway" within the meaning of paragraph (22) and would its enjoined extensions be the extensions of a railroad within that description?

2. Is petitioner "not operated as a part or parts of a general steam railroad system of transportation" within the meaning of that paragraph?

The ultimate holding of the court below, here to be reviewed, is that petitioner's present lines and proposed extensions come within the purview of paragraph (18) and are not within the immunity of paragraph (22), which provides:

> "The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, in-

dustrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

The court below supported its conclusion only on the reasoning that petitioner's threatened construction would not be extensions of an interurban electric railway, within the meaning of that paragraph. It rejected the additional reasoning asserted by these respondents (R. 81, allegation 16, Bill of Intervention) that in any event petitioner is "operated as a part or parts of a general steam railroad system of transportation," within the meaning of that language in paragraph (22) and is hence not within the exception for that additional reason. The court below thus followed the reasoning contained in the opinion of the court of three judges, Soper, J., writing, in the former suit, which opinion rejected our reasoning that petitioner is "operated as a part or parts of a general steam railroad system of transportation" but adopted our reasoning that it is not and would not be if extended an "interurban electric railway," within the meaning of paragraph (22). See 30 F. (2d) 421.

Either reasoning, or a combination of both, leads to the same conclusion, that petitioner and its extension proposals do not come within the immunity of paragraph (22). To hold that petitioner and its proposed extensions are not within the purview of paragraph (18) and that it is free to build the extensions without certificate, and hence to reverse the injunction decree below, this Court would have not only to reject the District Court's reasoning on the construction of the words "interurban electric railway," and their application to the facts of this case, but also to go further and approve the reasoning of the court below on the meaning of the words "which is not operated as a part or parts of a general steam railroad system of transportation," as used in the paragraph.

Even if there were error, which we deny, in the District Court's construction and application of the first clause containing the main exception, there would be no reversible error in the injunction decree if, upon the facts, the court below should have held that petitioner is "operated as a part or parts of a general steam railroad system of transportation," within the meaning of the limitation upon the main exception, which is an exception to an exception.

The only question for this Court is whether the court below correctly held petitioner and its extension projects to fall within the certificate requirement of paragraph (18) and not to fall within the immunity of paragraph (22). To establish that it is not subject to the prohibition but is within the immunity, the petitioner would have to establish both: that it is an interurban electric railway; and that it is not operated as a part or parts of a general steam railroad system of transportation. It must have both these characteristics before the immunity of paragraph (22) can apply. The entire question is before this Court on the record.

We assert that the injunction decree below is correct on both grounds, that upon the undisputed facts petitioner is not an "interurban electric railway" and its extensions would not be the extensions of such railway, within the meaning of the paragraph, and, in any event, it is "operated as a part or parts of a general steam railroad system of transportation," within the meaning of the expression in the paragraph.

This appeal calls for construction of both expressions as applied to the facts of this case. The two expressions must be construed together in the light of the remedial purposes of the legislation and the meaning of the latter expression bears upon the meaning of the former. A proper construction of either expression, and, *a fortiori*, a proper construction of both read together, will inevitably lead to the conclusion that Congress did not grant immunity to such extensions of such a railroad as here involved.

## SUMMARY OF ARGUMENT.

### I.

Petitioner and its enjoined extensions do not come within the meaning of the expression of paragraph (22) excluding from the authority of the Commission "construction * * * of street, suburban, or interurban electric railways," and hence the extensions without certificate were properly enjoined.

1. The words "interurban electric railways" in paragraph (22) have no clearly defined or technical meaning, are essentially ambiguous and necessarily call for construction.

2. The decision below correctly followed, and was controlled by, the decisions of this Court construing the Transportation Act in the light of its context and in the light of the remedial purposes it sought to accomplish, particularly *Texas & Pacific R. Co. v. Gulf, C. & S. F. R. Co.*, 270 U. S. 266, and laying down the controlling rules of statutory construction.

3. The decision below does not conflict with this Court's decisions in *Omaha & C. B. Street Ry. Co. v. I. C. C.*, 230 U. S. 324, and in *United States v. Village of Hubbard*, 266 U. S. 474.

4. The argument based on comparison of the slightly varying exclusion provisions of section 1, par. (22), and of sections 15a, 20a, 73, and 77, does not lead to the conclusion asserted by petitioner.

5. All the light to be found in the legislative history of the Transportation Act supports the decision below and shows that Congress did not intend to exclude such extensions of such a railroad as here enjoined.

6. General usage of the term "interurban electric railways" at and prior to the passage of the Transportation Act did not include or contemplate such a railroad as petitioner; and, if it had, it would not control the meaning of the statutory language.

7. The decision below is in accord with later and more authoritative decisions of the Commission and with the holdings of the lower federal courts.

8. Informal treatment of petitioner, in other connections, as an interurban electric railway, by the Commission prior to its formal decision in 138 I. C. C. 363, the ruling of the old Railway Labor Board, holding that petitioner was excluded from its jurisdiction under section 300 of the Transportation Act, and the fact that the Census Bureau and the Post Office Department have classed petitioner with other electric railways, some of which may be "interurbans," are without present significance.

II.

Petitioner is "operated as a part or parts of a general steam railroad system of transportation," within the meaning of the limitation upon the exclusion in paragraph (22), and hence is within paragraph (18). Thus, in any event, the extensions were properly enjoined.

## ARGUMENT.

I.

**Petitioner and Its Enjoined Extensions Do Not Come Within the Meaning of the Expression of Paragraph (22) Excluding from the Authority of the Commission "Construction * * * of Street, Suburban, or Interurban Electric Railways," and Hence the Extensions Without Certificate Were Properly Enjoined.**

**1. The words "interurban electric railways" in paragraph (22) have no clearly defined or technical meaning, are essentially ambiguous and necessarily call for construction.**

Petitioner, on its Supplemental Brief, adds only one argument to the four points argued on its Brief in support of Petition for Certiorari, the argument that the ex-

pression "interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation" is so plain and unambiguous as to leave no room for construction.

That expression is much more vague, doubtful and ambiguous than the preceding part of the same sentence, "of spur, industrial, team, switching or side tracks, located or to be located wholly within one State," yet this Court, in *Texas & Pacific R. Co. v. Gulf, C. & S. F. R. Co.*, 270 U. S. 266, construed those words in the light of the context and of the remedial purposes of the Transportation Act, rejected the literal or narrow meaning of "spur" and "industrial" tracks, rejected use of those words by Commission and courts, and reversed the Circuit Court of Appeals, which had applied what it conceived to be the literal meaning of the words and had refused to construe them in the light of the legislative purposes, upon the same theory invoked by petitioner on brief. See 4 F. (2d) 904.

If the words here involved be as plain and unambiguous as petitioner contends, it is strange that it did not proceed on its judgment in 1927 to extend without applying for certificate. The ambiguity inherent in the words themselves was originally sufficient to impel petitioner to litigate under protest before the Commission and to litigate voluntarily in the courts. The ambiguity in the words themselves was sufficient to raise in petitioner what this Court, on the former appeal, called its "fear instinct in the prophecy as to whether it will be held to be an interurban electric within the meaning of paragraph 22."

Plain and unambiguous words in a statute, within the meaning of the doctrine invoked by petitioner, do not raise a fear instinct in a prophecy as to their meaning and application. He who runs may read and apply plain and unambiguous language. Either petitioner knew it was not within the meaning of the words, if plain and unambiguous, or the words were so ambiguous that it dared not rely on its interpretation as applied to its facts.

After five years of litigation, during which the Commission, a special court, and the court below have uniformly construed the statutory words contrary to the vigorous contention of petitioner, it cannot now be asserted that the words are so plain and unambiguous as not to call for interpretation. Petitioner went to every length to have them authoritatively interpreted before it determined to test the question by forcing the issue by actual construction.

The quotation, p. 7 petitioner's Supplemental Brief, from *Crooks v. Harrelson,* 282 U. S. 55, while apt to that case, is entirely inapt here. The Court was there construing a tax statute, as to which the rule is to construe strictly against the government and in favor of the taxpayer, and to narrowly confine words to their literal meaning. Here the diametrically opposed rule applies, to construe a remedial statute liberally to effectuate the remedy, and to construe exceptions or provisos therein strictly.

The statutory language in issue in *United States v. Missouri P. R. Co.,* 278 U. S. 269, from the opinion in which petitioner quotes, Supplemental Brief pp. 9-10, was entirely different in character from that of section 1, paragraph (22), here involved. That case dealt with the plain provision of section 15, paragraph 4, that the Commission shall not require a carrier, without its consent, to participate in a through route which does not include substantially its entire line lying between the termini of the route. The Commission by order had required the Missouri Pacific to participate in a through route including only 46 miles of its line, whereas 308 miles of its line lay between the termini of the route. The language of that provision of the statute was, as this Court held, so plain and unambiguous as to leave no room for construction and the Commission's order clearly violated the provision. The principal contention of appellants there was not that the language was ambiguous and called for construction, but

that the re-enactment of the provision in the Transportation Act adopted previous uniform administrative construction expanding or modifying the plain words of the statute.

The quotation from the opinion there has no application here, where we have involved loose, vague, ambiguous, and non-definitive language necessarily calling for construction. The same is true of the quotations from *Sturges v. Crowninshield,* 4 Wheat. 122,. 202, and *Pirie v. Chicago Title & Trust Co.,* 182 U. S. 438.

The meaning of section 1, paragraph (22), contended for by petitioner does lead to absurd and unreasonable consequences: that the mere incident of motive power confers freedom on an interstate carrier to extend *ad libitum* without certificate; that Congress deliberately discriminated against carriers operated by steam and in favor of carriers of the same class, engaged in the same national business, but operated by electricity; that Congress used the word "interurban" in the etymological sense as including every electric carrier operating between cities, when all carriers operate between cities, and not in its ordinary meaning as referring to a carrier of local or parochial importance; that Congress intended, while placing extensions and abandonments of steam carriers under strict control of the Commission, to leave entirely free from such control any electric carrier, no matter how national its importance and business, provided only it be not owned and controlled by a steam railroad.

Under all the cases, language which, if literally or etymologically construed, would lead to such absurd, impossible, and unreasonable consequences, to consequences so violative of the major purposes of the legislation, is language calling for construction, interpretation in the light of the legislative purposes. Unquestionably this appeal presents a case for construction of ambiguous language in an exception in a highly remedial statute. What, then, are the controlling principles for its construction?

**2. The decision below correctly followed, and was controlled by, the decisions of this Court construing the Transportation Act in the light of its context and in the light of the remedial purposes it sought to accomplish, particularly Texas & P. R. Co. v. Gulf, C. & S. F. R. Co., 270 U. S. 266, and laying down the controlling rules of statutory construction.**

Although this Court has not expressly construed the particular words "street, suburban, or interurban electric railways" in paragraph (22) as applied to facts like those on this record and to the question here raised, it has fully defined the controlling principles for the construction of the Transportation Act, that it must be construed in the light of the context of its language, and in the light of the new legislative policy written into the Act, the evils sought to be cured, and the remedial purposes sought to be accomplished.

*Wisconsin Railroad Commission v. Chi., B. & Q. R. Co.*, 257 U. S. 563;
*New England Divisions Case*, 261 U. S. 184;
*Dayton-Goose Creek Ry. v. United States*, 263 U. S. 456;
*Railroad Commission v. Southern P. Co.*, 264 U. S. 331;
*Texas & P. R. Co. v. Gulf, C. & S. F. R. Co.*, 270 U. S. 266;
*Alabama & V. R. Co. v. Jackson & E. R. Co.*, 271 U. S. 244;
*Texas & N. O. R. Co. v. Northside Belt R. Co.*, 276 U. S. 475;
*Western P. Cal. R. Co. v. Southern P. Co.*, October Term, 1931, decided November 23, 1931, 76 L. Ed. (adv.) 120.

And this Court has laid down another important and applicable rule for statutory construction, that whereas the remedial part of a remedial statute must be liberally construed, in order to effectuate its remedial purposes,

by the same token exceptions in a remedial statute must be strictly construed, because such construction is equally necessary to effectuate the remedial purposes.

*Spokane-Inland Empire R. Co. v. United States*, 241 U. S. 344.

And it has expressly construed the first part of the same sentence of paragraph (22) in accordance with those rules of construction.

*Texas & P. R. Co. v. Gulf, C. & S. F. R. Co., supra.*

The Transportation Act of 1920 was a new departure in railroad regulation. It resulted from exhaustive investigations and studies by the interstate and foreign commerce committees of both houses, before which all possible light was thrown upon railroad problems. Previously Congress had regulated railroads only to the extent of preventing abuses. But the country at the end of federal control faced a situation in which the private owners could not take back their railroad properties for profitable operation unless the government should provide an affirmative regulation, not only to restrict and curb railroads, but also to foster, preserve and protect them. Otherwise, the country was threatened with the impairment of its great transportation systems.

The long labors of Congress resulted in the Transportation Act which did seek thus affirmatively to foster, preserve and build up the existing railroads through the powers given to the Interstate Commerce Commission. The regulation was unitary, having one general, all-controlling aim and purpose, and the particular means used and powers conferred are interrelated and essential parts of the whole. Among other particular powers and duties conferred were these: to prevent discriminations between persons and localities; to maintain group rate structures

and divisions which would assure fair return on investment to carriers; to recapture excess earnings above fair return to be used in a revolving fund to aid "weak sisters"; to supervise and control investments in new railroad construction, forbidding extensions or new construction or abandonments without certificate of public convenience and necessity, and to the same end to supervise issuance of securities for new investments.

In a series of cases these particular powers and duties have come before this Court for construction and interpretation and in each instance it has construed the statute in the light of the remedial purposes of the legislation.

The opinion of Chief Justice Taft for the Court in *Wisconsin Railroad Commission v. Chi., B. & Q. R. Co.*, 257 U. S. 563, first analyzed and described this new remedial policy written into the Transportation Act, and the background of evils sought to be remedied, in words since oft quoted. The Court there, giving a liberal construction to the Act to effectuate the legislative purposes, sustained a state-wide order of the federal Commission requiring the raising of intrastate rates above the level fixed by the state commission, to prevent discrimination against interstate and foreign commerce.

In the *New England Divisions Case*, 261 U. S. 184, the particular power involved was that authorizing the Commission, in fixing divisions in rates between connecting carriers, to take into consideration the importance to the public of the transportation service of the carriers. The Court held that this provision of the Transportation Act authorized the Commission to make a particular division of rates for the express purpose of relieving the financial needs of particular lines, so as to keep them in effective operation. The express provision of the statute there construed was in fact enlarged in the light of the remedial purposes of the whole legislation.

In *Dayton-Goose Creek Railway v. U. S.*, 263 U. S.

456, *the particular* power and duty of the Commission under the Transportation Act involved was the recapture provision. This Court affirmed the lower court in dismissing a bill to restrain the enforcement of an order of the Commission requiring the surrender of excess profits under the recapture clause. The Court reviewed its previous decisions construing the Transportation Act, held the recapture provision to be constitutional, and interpreted it, as to its scope of application, in the light of the controlling legislative purposes of the Transportation Act. The Chief Justice wrote this opinion and said:

> "This court has recently had occasion to construe the Transportation Act. In Railroad Commission v. Chicago, B. & Q. R. Co., 257 U. S. 563, 66 L. Ed. 371, 22 A. L. R. 1086, 42 Sup. Ct. Rep. 232, it was held that the act, in seeking to render the interstate commerce railway system adequate to the country's needs, had, by Secs. 418 and 422, conferred on the Commission valid power and duty to raise the level of intrastate rates when it found that they were so low as to discriminate against interstate commerce and unduly to burden it. In the New England Divisions Case (Akron, C. & Y. R. Co. v. United States) 261 U. S. 184, 67 L. ed. 605, 43 Sup. Ct. Rep. 270, it was held that, under Sec. 418, the Commission, in making division of joint rates between groups of carriers, might, in the public interest, consult the financial needs of a weaker group in order to maintain it in effective operation as part of an adequate transportation system, and give it a greater share of such rates if the share of the other group was adequate to avoid a confiscatory result.
>
> "In both cases it was pointed out that the Transportation Act adds a new and important object to previous interstate commerce legislation, which was designed primarily to prevent unreasonable or discriminatory rates against persons and localities. The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners

of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and, in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged.

"It was insisted in the two cases referred to, and it is insisted here, that the power to regulate interstate commerce is limited to the fixing of reasonable rates and the prevention of those which are discriminatory, and that, when these objects are attained, the power of regulation is exhausted. This is too narrow a view of the commerce clause. To regulate in the sense intended is to foster, protect and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety."

The case of *Railroad Commission v. Southern Pacific Co.*, 264 U. S. 331, involved the power and duty of the federal Commission to control new investments, constructions and extensions as applied to the building of a new union station. The state commission had required the establishment of a new station. The railroad opposed the requirement on the ground that the federal commission had not issued a certificate of public convenience and necessity, authorizing the investment and construction. The state court annulled the order of the state commission, and on writ of certiorari this Court affirmed the state court. The Transportation Act contains no express provision requiring certificate of public convenience and necessity for the construction of a union station. But con-

struing the whole act together, in the light of its purpose, the Court held that paragraphs (18) to (21) applied and that federal certificate was required. The Chief Justice wrote the opinion in this case. He quoted the above quoted passage from the opinion in the *Dayton-Goose Creek case.* Giving a broad interpretation to the remedial provisions of paragraphs (18) to (21), the Court said:

> "It is argued that paragraphs 18 to 21 of Sec. 402, refer only to extensions of a line of railroad having the purpose to include new territory to be served by the interstate carrier, and do not refer to an extension of new main track for the mere purpose of rearranging terminals within the same city. We do not think the language of paragraphs 18 to 21 can be properly so limited. We are confirmed in this by paragraph No. 22 which immediately follows:
>
> > 'The authority of the Commission conferred by paragraphs 18 to 21, both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one state, or of street, suburban, or interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation.'
>
> "This is a palpable distinction between the main tracks of an interstate carrier and its spur, industrial, switching or side tracks, and shows the legislative intention to retain any substantial change in the main tracks within the control of the Interstate Commerce Commission. It may well be that a mere relocation of a main track of an interstate carrier which does not involve a real addition to, or abandonment of, main tracks and terminals, or a substantial change in destination, does not come within paragraphs 18 to 21."

Construing together, in the light of the legislative purposes, both the provision for certificate as to extensions

and that for certificate as to security issues, the Court said:

> "But there is a great difference between such relocation of tracks or local union stations and what is proposed here. The differences are more than that of mere degree; they and their consequences are so marked as to constitute a change in kind. They come within paragraphs 18 to 21 of Sec. 402, and require a certificate of the Interstate Commerce Commission as a condition precedent to the validity of any action by the carriers or of any order by the State Commission.
>
> "Such a heavy burden as that involved in this new union station and the main track changes and extensions and other accessories would, in all probability, require the three railways to issue new capital securities, and this could not be done without the approval of the Interstate Commerce Commission. To be sure, this provision only becomes operative when securities have to be issued, and would not, of itself, prevent action by a state commission until such securities are seen to be necessary; but the provision indicates the general congressional plan."

The case most directly controlling of the question here is *Texas & P. R. Co. v. Gulf, C. & S. F. R. Co.*, 270 U. S. 266, in which this Court again construed in the light of the same general purposes of the statute the very provisions here involved, the prohibition of paragraphs (18) to (20) and the exception to that prohibition in paragraph (22).

There the Santa Fe proposed to build a track only seven and a half miles long, wholly within one state, to reach and serve a certain group of industries not theretofore served by it but already served by the Texas & Pacific. The anticipated revenues to be gained by the Santa Fe and diverted from the Texas & Pacific if the track were built amounted to only about $500,000.00 a year and the track would cost about $500,000.00. Such a track came

literally within definitions of "spur" or "industrial" tracks as defined by commissions and by courts, in other connections. It came within such terms as loosely used by railroads and by general usage. The Santa Fe claimed immunity on the theory that the track would be a "spur, industrial, team, switching or side track(s), located or to be located wholly within one state," within the meaning of the first part of the sentence of paragraph (22).

Manifestly it would have been located wholly within one state, just as here the petitioner manifestly is an electric railway. The question there was whether the Santa Fe's track would be a "spur" or "industrial" track within the meaning of paragraph (22), just as here the question is whether petitioner is and its proposed trackage would be of "street, suburban or interurban," within the meaning of the same immunity paragraph.

Comparing the facts here, Piedmont & Northern's proposed extensions would total 128 miles, one of them crossing a state line, and would create a continuous interstate line of railroad 255.89 miles long. (R. 424.) They would cost, without additional rolling stock, $11,638,456.00. (R. 44.) They would invade new interstate freight territory not previously served by petitioner and served by these respondents, adequately as the Commission has found, and would gain for petitioner new traffic amounting to approximately four millions of dollars the first year, and increasing at the rate of 8.4 per centum annually thereafter, diverting longer haul revenues from these respondents of at least twice the revenues gained. (R. 421-422.) These extensions would be engaged predominantly in interstate freight traffic of national importance, materially changing the railroad system of the southeast and creating a new effective trunk line of joint connecting carriers through the territory.

It is inconceivable, in view of the remedial purposes of the Transportation Act, that Congress could have in-

tended to bring within the requirement of paragraph (18) the seven and one half mile intrastate track of the Santa Fe and at the same time to free from that requirement by the language of paragraph (22) trackage of the magnitude and importance here involved.

In the *Texas & Pacific Case,* this Court rejected the argument that the Santa Fe's proposed track was immune from certificate requirement under paragraph (22) based on use of the terms "spur" and "industrial" tracks by the Commission, by state legislatures, and by courts, in other connections. It said:

> "In support of its contention that the proposed line constitutes an industrial track, the Santa Fe cites instructions differentiating branches from spurs, which are given by the Interstate Commerce Commission in forms long prescribed for accounting purposes. It points also to uses made of these terms in other connections by courts, by the Commission, and by state legislatures. A truer guide to the meaning of the terms extension and industrial track, as used in paragraphs 18 to 22, is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by Transportation Act of 1920. By that measure, Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss. See *Railroad Commission v. Chicago, Burlington & Quincy R. R. Co.,* 257 U. S. 563; *The New England Divisions Case,* 261 U. S. 184; *The Chicago Junction Case,* 264 U. S. 258; *Railroad Commission v.*

*Southern Pacific Company*, 204 U. S. 331. The Act sought, among other things, to avert such losses.

"When the clauses of paragraphs 18 to 22 are read in the light of this congressional policy the meaning and the scope of the terms extension and industrial track become clear. The carrier was authorized by Congress to construct, without authority from the Commission, 'spur, industrial, team, switching or side tracks * * * to be located wholly within one State.' Tracks of that character are commonly constructed to improve the facilities required by shippers already served by the carrier or to supply the facilities to others, who being within the same territory and similarly situated are entitled to like service from the carrier. The question whether the construction should be allowed or compelled depends largely upon local conditions which the state regulating body is peculiarly fitted to appreciate. Moreover the expenditure involved is ordinarily small. But where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress of national concern. For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest."

The court below followed these decisions of this Court, and felt itself particularly controlled by the *Texas & Pacific Case*. It said of that case, after reference to and quotation from the earlier decisions of this Court (R. 448-453):

"The Court in that case laid down the true guide for the construction of paragraph (22). It held that the guide was to be found in the context in which the language was used and in the relation of the specific provisions to the railroad policy and legislative purpose introduced by the Transportation Act. If the Court in that case had 'stuck in the bark' of the par-

ticular word used, had given to that word in this exclusion provision a purely literal meaning, the track sought to be built by the Gulf, Colorado & Santa Fe would have been an 'industrial track' just as much as the defendant in this case would be an 'interurban electric railway' within a strictly literal interpretation of that expression.

"The Supreme Court, in the Texas & Pacific case, did not allow their interpretation of the meaning of 'industrial track' to be controlled by arguments based on the rulings of the Commission as to what were industrial tracks, or by the sense in which railroad companies had loosely employed this expression. If they had been guided by such considerations, they would assuredly have held that the proposed track of only seven and one half miles was an industrial track. But the Supreme Court expressly repudiated these considerations, and took as its guide the real purpose which the extension would serve. They held that it was not an industrial track, but a real extension for which a certificate had first to be procured from the Interstate Commerce Commission before construction would be allowed, because of the effect which this extension would have on the rival railroad companies."

After quoting from the opinion in the *Texas & Pacific Case*, the District Court further said (R. 453):

"Such is the construction placed upon one half of paragraph 22. It is only logical to apply the same construction to the remaining portions of the same paragraph, *noscitur a sociis*. Congress bracketed these phrases together and it would be highly illogical to apply one rule of construction to one phrase and a different rule to the other."

We submit that the District Court's interpretation of this Court's decisions in the *Texas & Pacific Case* and in the previous cases construing the Transportation Act was entirely sound.

In *Alabama & V. R. Co. v. Jackson & Eastern R. Co.*,

271 U. S. 244, the Court followed and applied the decision in the *Texas & Pacific Case*. It broadly construed paragraphs (18) to (21) in the light of the remedial purposes, and held that by these and other provisions of the Transportation Act Congress had exclusively occupied the whole field not only of extensions and abandonments, but also of railroad connections, although the latter are not expressly mentioned in paragraphs (18) to (21), subject only to the narrow limitations of the exceptions contained in paragraph (22). After citing the *Texas & Pacific Case*, the Court there said:

> "The establishment of the junction at that point would, if the objection is well founded, obviously imperil interstate commerce. The fact that it may do so, shows that the jurisdiction of the Commission over such connections must be exclusive, if the duty imposed upon it to develop and control an adequate system of interstate rail transportation is to be effectively performed."

In the exceptions in paragraph (22) Congress only undertook to except those extensions and abandonments of such local and non-national importance as would not "imperil interstate commerce." Certainly the Commission cannot effectively perform the duties conferred by, and the legislative purposes enacted in, paragraphs (18) to (21) if paragraph (22) be construed to have left any electric railroad not owned or controlled by a steam railroad free to accomplish all the evils sought to be remedied.

In *Texas & N. O. R. Co. v. Northside Belt. R. Co.*, 276 U. S. 475, this Court cited the *Texas & Pacific Case* with approval and said:

> "The purpose of paragraphs 18 to 22 is to prevent interstate carriers from weakening themselves by constructing or operating superfluous lines, and to protect them from being weakened by another carrier's operating in interstate commerce a competing line not required in the public interest."

There the Court did not particularly construe the exemption language of paragraph (22). The specific holding was that so long as a steam carrier operates solely in intrastate commerce it does not come within the prohibition of paragraph (18), but that the moment it threatens an extension to be used in interstate commerce it comes within the prohibition. The holding of that case as to the purposes of these provisions of the Transportation Act is in entire harmony with previous decisions above cited.

In *Western Pacific California R. Co. v. Southern P. Co.*, decided November 23, 1931, 76 L. ed. (adv.) 120, this Court construed the expression "any party in interest" in the injunction provision of paragraph (20). Under that decision these respondents are unquestionably parties in interest entitled to maintain the present suit for injunction in the court below. The Court there again quoted from and re-affirmed the opinion in the *Texas & Pacific Case* as to the purposes of these provisions of paragraphs (18) to (22) of Section 1, and of that decision said:

> "Paragraphs 18 to 22, *supra*, were considered here in Texas & P. R. Co. v. Gulf, C. & S. F. R. Co., 270 U. S. 266, * * * and were declared to be part of the general plan by which Congress intended to promote development and maintenance of adequate railroad facilities."

The decisions of this Court above referred to are conclusive that these paragraphs of the Act are to be construed, first, in the light of the context of the language, and, second, in the light of the remedial purposes of the Act as those purposes have been declared by this Court.

A third rule for construction here particularly pertinent is that declared in *Spokane-Inland Empire R. Co. v. United States*, 241 U. S. 344, that whereas remedial provisions of a remedial act are to be liberally construed so as to effectuate the remedy, exceptions in such an act are to be

construed strictly, because a liberal construction of exceptions would have the same effect to defeat the remedial purposes as would a strict or narrow construction of the remedial provisions.

That case is particularly apposite here, not only for the general rule of construction stated, but also for the particular question there involved and its decision. The analogy to the situation here is close.

That was a suit by the United States to recover penalties against the railway company for violations of the Safety Appliance Act in hauling in interstate commerce cars not provided with hand holds or grab irons and not equipped with automatic couplers, as required by the act. The railroad asserted immunity under the exception in the act providing that it did not apply to "trains, cars, and locomotives * * * which are used upon street railways." The cars in question were being moved, at the time in question, over the railroad's interurban line. This line was distinct and separate from its street railway lines. The cars in question were, however, from time to time used on its street railway lines and the railroad argued, therefore, that they were within the statutory exception.

The argument of the railroad there was ingenious and was strikingly similar to the reasoning relied on by petitioner here. It argued that the statutory exception was unambiguous, and that the cars were literally used upon a street railway, which they literally were. It further made an elaborate comparison of the word "used" in the exception with the same word in the remedial part of the act, "used on any railroad engaged in interstate commerce." The contention was that since the Court had held the act to apply to all cars used on interstate commerce railroads, even though at the particular time moving in intrastate commerce, the word "used" in the exception clause must receive the same construction and exempt cars used on street railways, however temporary such use. It was further argued that to construe the ex-

ception not to apply to the facts at bar would be to expand without warrant the exact exclusion language used, and to treat "used" as if Congress had written "exclusively used," and the word "used" in the exception was contrasted with the words "exclusively used" in another exclusion provision exempting cars "exclusively used for transportation of logs." And the railroad there relied, as does petitioner here, on the decision in the *Omaha Street Railway Case,* 230 U. S. 324, as being controlling in its favor.

That argument was a clear parallel to petitioner's refinement of argument here in comparing exclusion provisions of different sections of the Transportation Act for distinctions of verbal nicety. But this Court rejected all those arguments, saying:

> "But we think the want of merit in the contentions is clear, and the unsoundness of the argument advanced to sustain them apparent. We say this because, while it is conceded that the obvious purpose of Congress in enacting the law and its amendments was to secure the safety of railroad employees, and that the amendment of 1903 sought to enlarge and make that purpose more complete, yet it is insisted that the exception in the act should receive such a broad construction as would destroy the plain purpose which caused the act to be adopted. But to so treat the act would be in plain disregard of the elementary rule requiring that exceptions from a general policy which a law embodies should be strictly construed; that is, should be so interpreted as not to destroy the remedial processes intended to be accomplished by the enactment. That the meaning contended for would be in direct conflict with this rule would seem free from doubt, since the inevitable result of sustaining the contention would be to put it in the power of a railroad, by operating a train for a trifling distance over tracks within the exception, to thereby secure the right thereafter to operate such train over long distances without regard to compliance with the safeguards of the statute which otherwise would be con-

> trolling. And this reasoning disposes of the contention deduced from the use of the word "exclusively" in the provision excepting cars used on logging railroads, and its absence in the street railway clause, since, on the face of the statute, the object of both provisions was to exempt both the logging and street railway cars from the operation of the act only when used for logging, on the one hand, and on street railways, on the other, and not to exempt them when not so used."

In last analysis, all of petitioner's argument in this case comes down to the proposition that although petitioner's railroad and its enjoined extensions, and the business done and to be done by it, are clearly within the remedial purposes of paragraphs (18) to (21), yet because in paragraph (22) Congress used the words "street, suburban or interurban electric railways" in an exception, and because petitioner operates between cities and thus is "interurban" in a literal and etymological sense, and because it operates by electricity, and because in different sections Congress used those same words with slightly varying verbal modification, the Court should give a sufficiently broad and liberal construction to the exemption to exclude petitioner from the remedial provisions.

The opinion of Soper, J., (now circuit judge of the Fourth Circuit) writing for the three judges in the former suit, applied the doctrine of the *Spokane-Inland Case* to the facts here in a way which is highly persuasive, in spite of the lack of jurisdiction of that court to determine the merits because the plaintiff there had chosen an inappropriate procedure. It was there said, after quotation from the rule of construction laid down in the opinion in the *Texas & Pacific Case*, 30 F. (2d) 431:

> "Now it is obvious that the purpose of the law will be defeated by too liberal an interpretation of the term 'interurban electric railway.' It could not be given the broadest of all meanings, for it would then

comprehend any railroad using electric power which runs between cities, without regard to the character or extent of its business. The electrification of steam roads in 1920 had already progressed to a considerable extent, and it cannot be supposed that it was the intent of Congress to except all railroads which should adopt electric motive power from the control of the Commission over new construction and extensions. On the contrary, it is an elementary rule that exceptions from the general policy embodied in a statute are to be strictly construed and are not to be so interpreted as to destroy its remedial purpose. Spokane & Inland R. Co. v. U. S., 241 U. S. 344. * * *"

That court then, after discussing *Omaha & C. B. St. Ry. Co. v. I. C. C.*, 230 U. S. 324, and *United States v. Village of Hubbard*, 266 U. S. 474, and after very cogently disposing of the Piedmont & Northern's argument based on precise comparison of the various exceptions contained in paragraph (22), section 15a, section 20a, section 73, and section 77, of the Interstate Commerce Act as amended, continued:

"It is obviously difficult to form an exact definition of the term under discussion and to say when the general freight business of an electric railway has become so great that it has crossed the line between an interurban railroad, engaged in the general transportation of freight, and a general carrier subject to the provisions of the statute. But there is no difficulty in the case at bar in determining that the Piedmont & Northern has ceased to be primarily an interurban railroad. If any line of demarcation is to be drawn, there can be no doubt that a railroad, 92 per cent of whose traffic comes from the general transportation of freight, and 95 per cent of whose freight traffic is interchanged with carriers connecting it with all parts of the United States, is to be placed in the same category as a general steam railroad.

"It is going too far to say that the Piedmont & Northern is outside the jurisdiction of the Commission over extensions, because, literally speaking, it

is an interurban electric railway. It is well settled that the literal meaning of the terms of a statute do not necessarily control. The Supreme Court has applied the rule in the interpretation of the term 'carriers' in Omaha Street Railway Co. v. I. C. C., *supra*, and again in construing the term 'industrial track and extensions' in Texas & Pacific Ry. v. Gulf, etc., Ry. Co., *supra;* and in each instance, has held that the literal significance of the words must give way to the general purpose of the enactment. The decision in Spokane & Inland R. Co. v. U. S., *supra*, is particularly pertinent in view of the fact that by far the most important activity of the Piedmont & Northern is its general freight business which it carries on precisely like an interstate steam railroad, and that this business has little relation to the local interurban service which it renders. The United States brought suit in that case against the carrier for violation of the Safety Appliance Act, in failing to equip cars with certain appliances required by the statute. The dereliction was admitted; but it was contended that no offense had been committed because the act did not apply to a street railway and the cars of the carrier on their regular route traversed a line of street railway. The court held that the exception in the act did not apply because the cars were also used in regular interstate traffic; for otherwise, the plain purpose of the law would be defeated. A similar result would follow in the case at bar if the transportation of relatively insignificant interurban business by the Piedmont & Northern should deprive the Commission of power to control the railway in the greater field of its operations in which it competes with general railroad systems. See also Railroad Comm. of Cal. v. Southern Pac. Co., 264 U. S. 331, 44 S. Ct. 376, 68 L. Ed. 713."

And that court concluded, after elaborate review of the cases, and full consideration of all the arguments of the Piedmont & Northern, 30 F. (2d) 436:

"It is our conclusion that the more recent rulings of the Commission conform to the purpose of the

statute and point the way to the correct classification of the Piedmont & Northern. Its freight traffic dominates so completely the field of its operations, and reaches so far, through interchange with other railroads, that it is outside the class which Congress intended to exclude from the control of the Commission. Even if in the beginning it was merely an interurban railroad, its essential character has so greatly changed, and its operations and interests have become so similar to those of a general steam carrier, that it is now well able to commit the mischiefs of uncontrolled expansion, which the act was designed to prevent."

The District Court below followed the reasoning of the three-judge court (R. 442), independently reviewed and applied to the facts here the decisions of this Court, and unerringly came to the same conclusion reached by the three judges. It said (R. 448):

"The Piedmont and Northern is certainly an interurban electric railway in the sense that it runs between cities. It is certainly an electric railway, in that its equipment and trains are motivated by electric power. We finally conclude that while it is closely tied up by existing traffic agreements, some of them highly perferential, yet its independence of control and operation is such as to keep us from saying that it is operated as a part of *any* general steam railroad system of transportation.* But if we allow such a literal construction to control us, we cannot help but feel that we would be flying directly in the face of the remedial purpose of the entire Transportation Act. We feel, further, that to do so would be to disregard the rule of construction of this particular statute which has been laid down for us by the United States Supreme Court. Further than that, the help which we have been able to get from the reports of committees and debates in Congress when the Transportation Act was being considered, clearly indicates that

*We deal with this reasoning in a later section of this brief, Point II, p. 100. Italics in the quotation are ours.

> Congress never intended to deprive the Commission of jurisdiction over extensions by a major interstate carrier of such importance as the Piedmont and Northern is shown to be."

As showing the exact parallelism between the reasoning of the Santa Fe in the *Texas & Pacific Case* and that of the Piedmont & Northern in the present case, and the identity of the principles of statutory construction involved in the two cases, it is pertinent to quote, in connection with the language of this Court in that case and the opinions of the three-judge court in the former, and of the District Court below in the present, Piedmont & Northern cases, the following from the opinion of the District Court in the *Texas & Pacific Case,* 298 Fed. 488, reversed by the Circuit Court of Appeals, 4 F. (2d) 904, but in turn reversed by this Court, affirming the District Court:

> "This brings us to the real difficulty in the case, the 'true character of the track' in issue, which difficulty springs out of and is accentuated by the fact that the terms 'extension of line of railroad' and 'industrial track' have no clear and established restrictive definition, either in dictionaries or in railroad practice, which will permit of the case being settled by rule of thumb, but, on the contrary, these terms have a wide latitude of meaning, according to the context in which they are used. Since Congress has not undertaken to define the words used, and since it is plain that they may be, according to the angle of approach, given wide and varied meaning, it is evident that the purpose of the act must be drawn from its entire structure, and that purpose, together with the context in which the words are used, must at the last be the guide to the interpretation of the words at issue."

Holding that the provisions of paragraph (18) must be construed broadly and those of paragraph (22) narrowly, in the light of the paramount purposes of the legislation, that court then said:

"Defendant, on the other hand, seizes on the words in paragraph 22 as indicative of the real purpose of Congress—that is, to keep the hands of the Commission off of extensions which are not clearly shown to be connected with all of the incidents of a complete railroad service—and from this angle they have no difficulty in showing that this line of theirs is merely an industrial track, because its whole purpose is to serve industries. It has no stations, no scheduled service, no passenger nor general freight traffic. This difference in the angle of approach is amply sufficient to account for the controversy between the parties, and the giving by me of full recognition to the effect of this difference in approach has enabled me to reach my conclusion, and to feel that, if my angle of approach is right, my conclusion must be sound.

"If, as I believe to be the case, paragraph 18 is the controlling portion of the act, and the purpose there expressed to make the public good, rather than the competitive instinct of railroad companies, the determining factor in the matter of whether substantial capital additions to existing railroads and substantial capital outlay in launching new roads shall be incurred, then in any case of complaint against the proposed addition to the capital account of a railroad company for the construction or extension of a line of road, which construction or extension is not sanctioned by a certificate of the Commission, an injunction ought to issue unless the constructor can satisfy the court that the construction is clearly within the exception to or limitation upon the statute, and is a side track, spur track, switch track, or industrial track, as contemplated and provided for in paragraph 22 of the act."

And, after quoting the master's findings of fact as to the character and extent of the traffic to be carried over the track claimed by the Santa Fe to be an "industrial track," and as to the invasion of the Texas & Pacific's territory thereby, that court concluded:

"Against this formidable array of facts tending to emphasize the importance, from a traffic and operat-

ing and a capital investment standpoint, of this construction, the defendant presents with force and vigor the consideration that nothing matters to this inquiry except the fact, which seems to be admitted, that these tracks are for the present, at least, to be used only for industrial purposes. They say, 'By their fruits ye shall know them;' they ask 'Do men gather grapes of thorns, or figs of thistles?' and say that a track which is constructed for the sole purpose of, and is devoted only to, the service of industries, is and can only be an industrial track.

"We are thus brought back to the beginning of the inquiry, and we conclude, as we began, that, if considering the words with their context, and in the light of the purpose of Congress, the court is authorized to give to them the broadest meaning of which they are susceptible, the defendant is right, for a track which serves only industries is in one sense certainly an industrial track.* But this, in my opinion, the court is not authorized to do, for not only does the principle 'noscitur a sociis' (see Bear Bros. v. Marx, 63 Tex. 298; Black on Interpretation of Laws, p. 194; Brown v. City of Galveston, 97 Tex. 1, 75 S. W. 488; U. S. v. Chase, 135 U. S. 255, 10 Sup. Ct. 756, 34 L. Ed. 117; Gegiow v. Uhl, 239 U. S. 3, 36 Sup. Ct. 2, 60 L. Ed. 114) require a different construction; not only does the fact that paragraph 22 is in the nature of a proviso (U. S. v. Dickson, 15 Pet. 141, 10 L. Ed. 689); but that sixth sense for the interpretation of statutes, and the application and enforcement of statute law in the courts, which the Supreme Court in Standard Oil Co. v. United States, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, and United States v. American Tobacco Company, 221 U. S. 107, 31 Sup. Ct. 632, 55 L. Ed. 663, calls the 'rule of reason,' requires the court to refuse to give to the word 'industrial' as here used, the broad and comprehensive meaning contended for."

The Circuit Court of Appeals for the Fifth Circuit, reversing the District Court, in the opinion which this Court

*Just as an electric railroad which runs between cities, no matter how important it be, is an "interurban electric railway" within the broadest meaning of that term. (Foot-note ours.)

in turn reversed, 4 F. (2d) 904, approached the facts of the *Texas & Pacific Case* from the opposite viewpoint, from the viewpoint from which petitioner's briefs view our present case, stressing the proviso or exception of paragraph (22) rather than the essential regulatory provision of paragraph (18). It relied on court opinions and actions of the Commission as showing that such trackage as was there involved had been "customarily" referred to as an industrial track. It interpreted paragraph (22) as "withholding power" of the Commission over all trackage which had generally or customarily been referred to as industrial tracks prior to the enactment of the Transportation Act. And it rejected the argument that paragraph (22) should be narrowly construed in the light of the legislative policy of the Act, in these words, which sound like a direct paraphrase from petitioner's brief in this case:

> "Such a consideration cannot properly prevail in the case of a proposed enlargement of trackage which is found to be within the meaning of the explicit provision of the above-quoted paragraph 22. It is not for the courts, by giving to descriptive words used in that paragraph meanings narrower or less inclusive than such words customarily had at and prior to the date of the enactment, to reach the same result as would be effected by an amendment of the statute."

But this Court held that such a consideration did prevail, rejected the considerations on which the Circuit Court of Appeals relied, and rejected the viewpoint from which that court had approached the facts and the construction of the statute.

The same considerations are relied on by the petitioner here as those rejected by the District Court and by this Court in the *Texas & Pacific Case*. Petitioner approaches and argues this case from the same philosophical and logical viewpoint from which the Circuit Court of Appeals approached the *Texas & Pacific Case*. It argues that

court decisions in other connections had referred to electric railroads other than electrified portions of steam railroads on the one hand, and street and suburban railways on the other hand, as "interurban electric railways." It argues that census reports have referred to it and railroads similar to it as "interurban electric railways." It argues that the Labor Board held it to be such under the Labor Board Act. It argues that such railways were generally and "customarily" referred to as "interurban electric railways" prior to and at the time of the enactment of the Transportation Act. It argues that the decision of the District Court below amounts to judicial legislation under the guise of statutory construction, and that it is not for courts, by giving the words "interurban electric railways" in paragraph (22) a meaning "narrower or less inclusive than such words customarily had at and prior to the date of the enactment, to reach the same result as would be effected by an amendment of the statute," that it is for Congress, not the courts, to narrow the literal language of the exception.

We submit that all these arguments are conclusively answered by this Court in its opinion in the *Texas & Pacific Case.*

As the District Court said in that case, it will not do to seize upon the words in paragraph (22)—literally and as if standing alone—"as indicative of the real purpose of Congress." The controlling portion of the statute is paragraph (18), and paragraph (22) must be given the usual narrow construction of a proviso in the light of all the context of the Act and in the light of the major legislative purposes.

It would take the broadest and most comprehensive meaning of the words of paragraph (22) to cover the petitioner and its extensions here involved. Petitioner frankly argues for the broadest of all possible meanings of "interurban electric railways." It asserts that the expression means any independently operated and owned

electric railroad, not the electrified portion of a steam railroad, no matter how extensive its line or how preponderant its interchange, national freight traffic. The exigencies of its case demand that its assertion go that far. For if the extensions here involved, of a railroad of the character here involved, are within the proviso of paragraph (22), then it is inconceivable that any independent electric railroad would not be. If petitioner is within the proviso, then no line can be drawn, and if a railroad is independent and electric it is free to extend *ad libitum*, no matter how extensive its scope or how nationally important its traffic.

The rule of reason instantly rejects the thought that Congress intended to leave such a railroad as petitioner free to make such extensions as are here enjoined without certificate of the Commission. The application of the doctrine of the *Texas & Pacific Case* instantly rejects that thought.

No more perfect example of invasion of territory already adequately served and violation of the purposes of the Transportation Act could be imagined than is presented in this case. Here a carrier, broadly engaged in a general interstate, interchange business of national importance, from which it already derives revenues putting it in the group of Class I railroads of the United States, seeks, without federal approval, to build extensions which will give it a continuous line from the center of one state to the center of another state, which will directly parallel and duplicate the facilities of existing adequate carriers, which will invade a traffic field new to petitioner, which will open up to it new through routes for national traffic, will make it more completely than ever a part of the general steam railroad system of transportation of the Southeast, and which will actually make it the interior connecting link in a new trunk line of connecting carriers running throughout the whole Southeast. And yet it contends that under a literal interpretation of the words "interurban

electric railway" in paragraph (22) it is entirely free to do this without federal certificate, and no matter to what extent it affects national transportation and diverts traffic of a national character from existing routes and channels.

If the seven-and-a-half mile and wholly intrastate extension of the Santa Fe, leading to serve only certain particular industries in a small and wholly intrastate territory, was held not to be an industrial track located wholly within one state, because it violated the remedial purposes of the Transportation Act, how much more must the petitioner be held to be not an "interurban electric railway, which is not operated as a part or parts of a general steam railroad system of transportation," being already engaged in business of the national scope and importance shown by the facts in this case, and proposing to more than double the extent of its national business and to double the amount of revenues it diverts from other carriers, by more than doubling its length of interstate line and connecting up more immediately as an actual part of a new effective trunk line through the Southeast.

Petitioner attempts on brief to avoid the controlling effect of the decision in the *Texas & Pacific Case* by calling attention to the fact that the expression "located or to be located wholly within one state" grammatically modifies only the exception of "spur, industrial, team, switching, or side tracks" particularly construed in that case, and does not modify the other part of the sentence here in question, the exception of "street, surburban or interurban electric railways." The suggestion is that this constitutes a difference in scope of the two exceptions which would render this Court's construction of the first inapplicable to the second.

In passing we state what will be elaborated in the second main head of this brief, that while the expression "located or to be located wholly within one state" was used with reference to the exception of spur, industrial,

team, switching or side tracks, evidencing the intention to confine the scope of that exception to trackage of only purely local significance, not directly bearing upon and affecting national transportation and the national transportation system, and not of a character to conflict with the remedial purposes of the statute, Congress similarly modified the exception of "street, suburban, or interurban electric railways" by the limitation "which are not operated as a part or parts of a general steam railroad system of transportation," an expression equally apt to limit the scope of that exception to railways and trackage of purely local significance, not of a character to conflict with the purposes of the Act, and not really operated as a part of that which was sought to be fostered and preserved, the general steam railroad system of transportation. The use of that limitation on the exception as to electric railways was the expression of the same *rationale* for exclusion as that expressed by the use of "located or to be located wholly within one state."

The Santa Fe's proposed track would have been located wholly within one state. Had the decision and the statutory construction turned on that language and that fact, the Santa Fe would have been free to build the track without certificate. This Court held the track was within paragraph (18) and not within the meaning of paragraph (22) *in spite of the fact that it would be wholly intrastate* and because the track and the business to be carried over it were of a character to conflict with the purposes of the Transportation Act, and because the track was not, therefore, what was *meant* to be excluded by paragraph (22), whatever it may have been within loose and general meaning of the words used.

So that decision cannot be distinguished, as petitioner attempts to distinguish it, on the theory that the words "located wholly within one state" in paragraph (22) modify only "spur, industrial, team, switching or side tracks," and not "or of street, suburban, or interurban

electric railways, which are not operated as a part or parts of a general steam railroad system of transportation," and that to that extent those words constitute a difference in treatment. This Court's decision did not turn on such distinction, if it exists, since the trackage there involved was wholly within one state. The District Court's decision below did not turn on either the recognition or rejection of such distinction. And the extensions of the petitioner here enjoined would not be located within one state. They would be interstate extensions.

And they would, furthermore, clearly be operated as parts of the general steam railroad system of transportation of the territory and of the United States, just as much so as if they should be operated by steam.

Petitioner argues by a process of elimination: that it is not a steam railroad; that it is not a street or suburban electric railway; that it is not the electrified portion of a steam railroad; *ergo*, that it must be an interurban electric railway, because there is no other class in which it can fall. Just there lies the fallacy, in the assumption that there is no other class in which to fall.

Petitioner is an independent, standard, freight carrying electric railroad, operated in connection with steam railroads and as an important part of the general steam railroad system of transportation of the Southeast and of the nation. Its business is the same as that of steam railroads which are important links in the national system. Paragraph (22) cannot be read to exclude from Commission authority a railroad of that class.

If paragraph (22) is to be construed as exempting petitioner and the enjoined extensions from the requirement of paragraph (18) then the purpose of the exemption would have been much more accurately expressed by such words as, "or of electric railroads not owned or operated by a steam railroad." If petitioner is exempt, any independently owned and operated electric railroad would be exempt, no matter what its size, scope and importance.

But Congress did not write such an exemption into the statute. It cannot be written into the statute by construction.

Applying the rules of construction this Court has laid down in the above cases, petitioner and its enjoined extensions clearly fall within paragraph (18) and not within paragraph (22).

First, construction in the light of the context. The question in this case cannot be answered by isolating the three words "interurban electric railways" from their context and applying a literal or a liberal construction to them. They are used in the paragraph in immediate context with "street, suburban," and with "which are not operated as a part or parts of a general steam railroad system of transportation." The expression "or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation" comprises one excepted class. The context of street and suburban with interurban electric railways is eloquent as to the kind of railways intended to be excepted.

Again, this whole expression is in immediate context with, a part of the same sentence with, "spur, industrial, team, switching or side tracks, located or to be located wholly within one state." This context is likewise eloquent as to the character of extensions or abandonments intended to be excluded from regulation. The whole of paragraph (22) defines one excepted class and manifestly the same *rationale* for exclusion runs through it.

This becomes even more clearly manifest when the language of the paragraph is related to the remedial purposes of the whole Act, as this Court has declared it must be related.

And, finally, when to construction in the light of the context, and to construction in relation to the remedial purposes, there is added the third rule, that the remedial provisions must be liberally construed and the exception

provisions narrowly or strictly construed, there can be no reasonable doubt that there was no intention by Congress to exclude a railroad and extensions of the character here shown, and that the decree below was right.

The intention of paragraph (22) was to leave free from certificate authority construction and abandonment only of such trackage as is of purely local importance, of no substantial effect on the general interstate transportation system, and not calculated to accomplish the evils sought to be remedied by paragraphs (18) to (21) and by the other remedial provisions of the Transportation Act.

One of the four asserted grounds on which certiorari was sought was that the District Court, in treating the opinion of this Court in the *Texas & Pacific Case* as controlling the decision in this case, carried the doctrine of that opinion too far. We submit that the District Court took that decision just as it was written and carried it no further than it necessarily carries itself *ex propria vigore*. We think the decree below could not be reversed without overruling the *Texas & Pacific Case*.

**3. The decision below does not conflict with this Court's decisions in Omaha & C. B. Street Ry. Co. v. I. C. C., 230 U. S. 324, and in United States v. Village of Hubbard, 266 U. S. 474.**

Another of the four grounds on which certiorari was petitioned was an asserted conflict of the decision below with this Court's decisions in the *Omaha Street Railway Case, supra*, and in the *Village of Hubbard Case, supra*.

In neither of those cases did this Court undertake to draw a line of distinction between the class of "street, suburban, or interurban electric railways" and the class of electric railroads which are more than interurbans and are in the same category as to business and effect on national commerce as interstate steam railroads. In both, the Court drew an altogether different line, that between

street railways, which are not regulated by the Interstate Commerce Act, and interurban electric railways and other electric railroads, which are within the Act.

The questions involved in those cases were quite different from the question here involved and nothing that was said in them was inconsistent or in conflict with the decision below or with this Court's decision in the *Texas & Pacific Case* which controlled the court below. If there were such conflict, the decision in the *Texas & Pacific Case*, being the latest, would still control. But we see no such conflict.

The *Omaha Street Railway Case* was decided years before the enactment of Transportation Act, 1920, to-wit on June 9, 1913. It drew the line of distinction between street railways, which were not subject to any regulation by the Interstate Commerce Commission, and electric railroads, which were subject to its regulation as being "railroads" engaged in interstate commerce. The specific holding was that a street railway, built in streets and not on private right of way, having no power of eminent domain, and engaging in, and authorized to engage in, no freight carriage, but doing only a passenger business, was not a "railroad" as that term was used in the Act to Regulate Commerce and hence was not subject to Federal regulation even though it carried passengers on street cars across a state line.

In holding that, this Court merely distinguished such a street railway from interurban railways with electric motive power which are "railroads" and, as such, subject to the Act to Regulate Commerce if engaged in interstate commerce. No attempt was made to draw the line within the general class of electric "railroads" subject to Federal regulation, distinguishing between those properly classed as "interurbans" and those outside such class.

The *Village of Hubbard Case* was decided after the passage of the Transportation Act, to-wit on January 5, 1925. But there again this Court did not attempt to draw

the line of demarcation between electric railroads properly classed as "interurban electric railways" and electric railroads which cannot properly be so classed under the provisions of the Transportation Act.

The precise holding there was that the Interstate Commerce Commission had jurisdiction, under the Act of 1887 to Regulate Commerce, to prevent discrimination against interstate commerce by an interurban electric railroad even though not engaged in the general transportation of freight. There again the court simply gave its attention to the line of distinction between street railways, not subject to Federal regulation at all, and interurban electric railways which are subject to Federal regulation.

The court did there comment, in support of its holding that the Commission had power to regulate interurbans, on the different provisions of the Transportation Act referring to interurbans, *as negativing an intention to exclude such carriers from Federal regulation.* There was no attempt to draw the line here involved, within the general class of electric railroads subject to Federal regulation, between those railroads properly classed as "interurban electric railways" within the various inclusion and exclusion provisions, on the one hand, and, on the other, electric railroads properly in the same category for regulation as steam railroads and hence not within the class of "interurban electric railways," excluded by some provisions of the Transportation Act from, and included by other provisions in, specific regulatory powers of the Commission.

Nowhere in the opinion in that case is there an intimation that an electrically operated freight carrier of the national importance of the Piedmont & Northern is to be deemed an "interurban" within the meaning of paragraph (22) or of any other of the statutory provisions referred to. Nowhere in the opinion is there any intimation that the court considered that, under the guise of extensions of an "interurban electric railway," it is open to an in-

dependently operated freight carrier of the character of the Piedmont & Northern, without federal supervision, to connect up with new steam road connections and form a new paralleling and competing trunk line of carriers of the scope and national importance shown to be proposed on this record.

The only significance of that case here from the standpoint of the petitioner seems to be that the Court said (pp. 479-480): "Transportation Act, 1920, c. 91, 41 Stat. 456, enlarged in several respects, the powers of the Commission, and dealt also in other ways with carriers engaged in interstate commerce. In doing so, it provided expressly in five sections for the exclusion of certain electric railways from the operation of the powers conferred; and it also differentiated interurban electric railways from street and suburban railways by specific reference to each, although a distinction in treatment was made in only one case"; and that the court appended to this passage of the opinion foot-note 7 in which it matched up the varying provisions of section 422 (15a); section 402 (sec. 1, par. 22); section 439 (20a); section 209; and section 300.

In doing this the court merely placed the sections side by side and adverted to internal distinctions between street, suburban and interurban railroads, and between various kinds of interurbans, all of them within the language of the various sections.

The court did not have its attention upon and was not considering the outside dividing line between "interurbans", variously excepted or not excepted by the varying qualifying language of the five sections of the Act, and those electric railways which are outside of any reasonable classification as "interurbans" and hence excluded from federal regulation by none of the sections referred to. It is that outside dividing line which is to be surveyed here.

There was in that case no intimation that the court considered that all electric railways are within the term

"interurban" as used with divers qualifications in all five sections.

Foot-note 4 to the opinion is far more significant of what the court understood to be included within the general term "interurban" since it points out that of 267 operating "interurbans" which filed reports for 1917, 40 did not report any freight revenue, and that of the total revenue of the 267, only 9.4 per cent was freight revenue.

Manifestly the court in referring to "interurbans" was referring to a class of railroads vastly different in character from the Piedmont & Northern.

The *Hubbard case* dealt generally with all electric railroads which are outside the strict class of street railways and which hence were within the powers of the federal commission to regulate. It did not treat that general class as in any wise being limited to "interurbans," but only as being different from unregulated street railways and as including "interurbans". The fact that the regulated class was considered as *including* interurbans in no way indicates that the Court meant that it was *confined* to interurbans and that any railroad within that regulated class should be considered as an interurban. The court used both the expression "electric railroads" (p. 478) and the expressions "interurban electric railroads" and "interurban roads". What it held was that all electric railroads outside the class of street and suburban railways were subject to federal regulation, and that included within that class of electric railroads were "interurban electric railroads."

It would be a strange anomaly to draw from that holding the conclusion that any electric railroad within the class held to be subject to federal regulation is by that very fact to be held to be an "interurban" excluded from federal regulation of extensions by paragraph (22).

**4. The argument based on comparison of the slightly varying exclusion provisions of section 1, paragraph (22), and of sections 15a, 20a, 73, and 77, does not lead to the conclusion asserted by petitioner.**

For convenience we refer to these sections here by their section numbers as they now appear in Title 49, U. S. C. This argument is one of the four grounds upon which certiorari was petitioned.

Petitioner compares, as being substantially alike, the exclusion language contained in the following:

> Section 1, paragraph (22)—"or of street, suburban, or interurban electric railways which are not operated as a part or parts of a general railroad system of transportation."
>
> Section 20a, paragraph (1), as to securities—"(except a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation)."

It contrasts with those two provisions the following two exceptions:

> Section 73, paragraph (a), defining "carriers" under the provisions for reimbursement of federal control deficits with the proviso: "but does not include any street or interurban electric railway which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both;"
>
> Section 77, paragraph (a), defining "carriers" under the provisions for guaranty after termination of federal control, and similarly providing: "but does include a street or interurban electric railway not under Federal control on February 29, 1920, which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both;"

It notes the expression "not under Federal control on February 29, 1920," which appears in the definition in Section 77 but does not appear in that in section 73.

And finally it contrasts with all those exclusion provisions that contained in section 15a, defining "carriers" under the fair return and recapture provisions, but

> "excluding * * * (c) interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight,"

Imputing to Congress the most refined concentration on precision in choice of language in these scattered exclusion provisions in divers sections of the Act governing different subject-matters, and a nicety of comparative phraseology rare in legislative proceedings, the argument is built up from this critical comparison as follows:

1. The omission of the reference to federal control in section 73 and the use of the words "not under Federal control" in section 77 shows that Congress recognized that there were some "interurban electric railways" which were taken over, and others which were not taken over, under federal control.

(Petitioner was taken over as an interstate carrier and was operated by the Director General under federal control; it was one of only six independent electric lines so taken over, R. 410.)

2. The use in sections 73 and 77 of the modification "which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat and light, or both," shows the intention of Congress not to exclude from the deficits and guaranty provisions "interurban electric railways" which have as their principal source of operating revenue passenger traffic; thus recognizing that there were within the class known to Congress as "interurban electric railways" some railways deriving more than half their revenues from passenger traffic and others deriving more than half their revenues from freight traffic.

3. From this, and from the fact that the modification contained in sections 73 and 77 does not appear in section 1, paragraph (22) or in section 20a, it is argued that the fact that more than half an electric carrier's revenues are from freight, rather than from passenger traffic, does not take it out of the exclusions of section 1, paragraph (22) or of section 20a, provided it is not operated as a part (or parts) of a general steam railroad system of transportation.

4. From the above considerations, and from the added fact that Section 15a contains a modification additional to that contained in section 1, paragraph (22) and in section 20a, to-wit the modification "or engaged in the general transportation of freight," it is argued that Congress understood the class of "interurban electric railways," variously referred to in the five sections, as including electric railroads not operated as a part of a general steam railroad system of transportation but which engage in the general transportation of freight, even to the extent of deriving more than half their operating revenues from freight traffic.

Upon this reasoning petitioner leaps a wide gap to reach a conclusion not supported by the premises and the deductions of the reasoning: that the petitioner and its enjoined extensions are freed from Commission regulation under section 1, paragraph (18), by the language of paragraph (22).

In the first place, if this Court holds, as we think it must upon the facts, that petitioner's lines are now, or as extended would be, "operated as a part or parts of a general steam railroad system of transportation" (see Point II, *infra*), then the whole of the above argument falls to the ground, for then petitioner expressly is not within the exclusion of paragraph (22), whether it be an interurban or an electric railroad *more than an interurban,*

as its traffic manager swore it was (R. 179*), whether an electric railroad engaged in the general transportation of freight and deriving more than 50 per centum of its revenues from freight is or is not within the term "interurban electric railway" in the various sections, and regardless of all the other comparisons.

A proper consideration of the manifest meaning of the expression "which are not operated as a part or parts of a general steam railroad system of transportation," of the legislative history and the context of the statute, as showing that by using those words Congress sought to make clear that it was not excluding such a railroad as this either from regulation of extensions and abandonments by paragraph (22) or from regulation of securities issues by Section 20a, or from fair return and recapture provisions by 15a, in all of which sections that language appears, will clarify the whole case, harmonize the five sections entirely, and bring them all squarely in line with the controlling legislative policy of the Act. The Act should be construed so as to harmonize the various sections, not so as to accentuate minor verbal distinctions between various exclusion provisions.

The carefully reasoned, and entirely sound, answer which the three-judge court gave to petitioner's elaborate argument on the comparison of the five sections, 30 F. (2d) 432-433, would have been entirely unnecessary had that court given the natural, grammatical, and manifest construction to the modification, "which are not operated as a part or parts of a general steam railroad system of transportation," and had it interpreted that clause as all

*Mr. Cureton, Traffic Manager of the Piedmont & Northern, testified before the Commission, his testimony being introduced on the trial below, that he considered "the Piedmont & Northern Railway as an interurban railroad plus; it performs all the characteristic service of an interurban railroad and equals that of the standard railroads in other respects * * * essentially and in the large, the P. and N. is a freight carrier, and it is from freight that it gets its revenue, and that is the source it expects to get its revenue from when extended. The great majority of freight on the P. & N. is interstate." (R. 179.)

the context, the policy, and the legislative history of the Act shows it should be interpreted.

But pretermitting the question of the proper construction of "which are not operated as a part or parts of a general steam railroad system of transportation," and eliminating that clause from consideration, still the argument of petitioner entirely fails to reach the conclusion sought.

It must be remembered that all these exclusion provisions are provisos or exceptions from the regulatory and remedial provisions of the Act. Not only does the doctrine of *Spokane-Inland Empire R. Co. v. United States*, 241 U. S. 344, forbid a liberal or broad construction of an individual exception in a remedial act but *a fortiori* it forbids a hypercritical gathering together of different exceptions in different remedial provisions governing different subject-matters and a broad construction of all of them together to give a broader exclusion effect to one of them than it would have standing alone. That is one step further in error than the construction denounced in the *Spokane-Inland Empire Case*.

But leaving the rule of liberal construction of the remedial provisions and strict construction of provisos entirely aside, where does the extreme logic of petitioner's argument lead?

The argument based on the exceptions in Sections 73 and 77 goes no further than a conclusion that an "interurban electric railway" may have as its principal source of operating revenue something other than urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both. The inference goes no further than that an electric carrier may still be classed as an "interurban electric railway" within the meaning of the five provisos even though its principal operating revenues come from *urban, suburban,* or *interurban freight* and *express.*

No inference can be drawn from comparison of sections

73 and 77 with the other three sections that Congress understood "interurban electric railways" to include an electric carrier deriving the principal part of its operating revenues from *interstate freight*. *A fortiori* this comparison gives rise to no inference that Congress classed as an interurban an important electric railroad operated as a feeding and connecting line in connection with large interstate steam railroad systems, operated as an important link in the general steam railroad system of the territory, a Class I carrier performing the same business as the interstate steam roads, 94.5 per cent of whose revenues are from freight, 95.7 per cent of whose freight is interline, interchange freight moving to and from distant points all over the country, and only an inconsiderable portion of whose business is local, urban, suburban, or interurban business, freight and passenger.

The broadest construction of those exceptions falls far short of the conclusion sought to be reached.

Nothing remains except the comparison between the exceptions in 15a and in section 1, paragraph (22) and section 20a, the use in 15a alone of the modification "or engaged in the general transportation of freight" in addition to the modification as to operation as a part of a general steam railroad system of transportation which appears uniformly in all three.

It is clear that no electric carrier which is operated as a part of a general steam railroad system of transportation is exempted by either of the provisos, by paragraph (22) from the provisions of paragraph (18) as to extensions and abandonments, by 15a as to the fair return and recapture provisions, or by 20a as to security issues.

It is further clear that any electric carrier which is operated as a part of a general steam railroad system of transportation will necessarily be engaged in the general transportation of freight. So as to such carrier the additional modifying clause in 15a is without significance.

Manifestly some significance must be given to the added

modifying clause in 15a which does not appear in 20a or in paragraph (22). It means that some carriers may be within the fair-return and recapture provisions which do not come within the Commission's authority over extensions, abandonments and security issues. But this added modification is not to be expanded beyond its proper and necessary effect. What kind of carrier, engaged in the general transportation of freight, but not operated as a part of the general steam railroad system of transportation, was contemplated by Congress as properly coming within the fair value and recapture provisions but as not coming under the Commission's authority as to extensions, abandonments, and securities issue?

Certainly *not* such a carrier as the Piedmont & Northern. An illustration may suggest what *was*.

Suppose a short, truly interurban electric line, running from a city in one state near the line to a city just across the line in the other state. It is not operated as a part of the general steam railroad system of transportation. It does not connect with, or does not interchange substantial freight with, interstate steam carriers. It is not a link in the general system of transportation sought to be fostered and preserved by the new legislative policy of the Transportation Act. Yet its principal revenues are derived not from passenger traffic or from sale of power, heat and light, or both, but from the general transportation of freight between the two cities. It handles all classes of commodities between the two cities.

Its business, therefore, although of national concern in the sense that it is technically interstate commerce and hence within the federal jurisdiction under the commerce clause (see *Texas & N. O. R. Co. v. Northside Belt R. Co.*, 276 U. S. 475, 479), yet for all that is distinctly local and essentially "interurban" in character. It is devoted to service between the two cities, and that is what "interurban" means, just as "suburban" means service between

a city and a suburb, and as "urban" means service within a city.

Or the illustration may be changed without changing its effect. Postulate the same sort of carrier between the two cities in the same state, similarly engaged in the general transportation of freight between the two. Yet without interchanging substantial national traffic and without operating as a link in the steam system it does handle some freight between the two cities which has origin or destination without the state. Without doing a substantial or predominant business of a national scope, it is yet carrying interstate commerce and hence is within the commerce clause and generally within the act to regulate interstate commerce.

In either postulated case the carrier is within the Federal Employers' Liability Act, the Safety Appliance Act, and other such general regulations. Being engaged in interstate commerce it is within the legislative purposes of the fair return and recapture provisions of 15a.

But in either case, suppose the carrier desired to make a short extension of its line to reach another adjacent city, to extend the interurban service without changing the essential character of the business. Such extension would be of purely local and "interurban" importance. It would require no issue of securities, or no considerable issue. It would have no effect on the general market for railroad securities. It would invade no interstate traffic territory of interstate carriers. It would have no substantial effect on the national transportation system. It would make no changes in the currents and routes of national traffic. It would injure no other carrier. It would furnish an additional local freight service of a general nature not previously furnished. It would not conflict with the remedial purposes of section 1, paragraph (18) and of section 20a. Yet all the while it would be within the purposes of 15a.

There may or may not be such carriers in existence.

Evidently Congress contemplated the possibility that there might be and took care of the possibility by the additional modifying clause in 15a.

But no logical inference can be drawn therefrom that it intended to bring within 15a and to exclude from section 1, paragraph (18), and from section 20a, a carrier of the character and importance of the Piedmont & Northern, proposing extensions of the importance shown on this record.

Again, the language of the court of three judges is highly significant, regardless of the want of procedural jurisdiction. The opinion of Soper, J., completely answered petitioner's argument erected upon the critical comparison of the five provisos. It was there said, 30 F. (2d) 432-433, setting out the various exclusion provisions in a foot-note:

> "Congress has been careful, however, in various enactments, to distinguish between general steam railroads and interurban electric railroads, and also between members of the latter class with reference to the character of business done. In a number of instances, electric railroads have been excluded from the benefits provided or the authority conferred upon the Commission by the statutes. It is apparent from these enactments that the carrier described by Congress as an interurban electric railway is one which may have one or more of the following characteristics: (1) It may be operated as part of a general steam railroad system of transportation. (2) It may have as its principal source of operating revenue, passenger traffic or sale of power, heat, and light. (3) It may have as its principal source of revenue, freight traffic. (4) It may be engaged in the general transportation of freight. (5) It may make through traffic arrangements with steam railroads and thereby increase its freight business.
>
> Moreover, it is clear that engagement by an interurban electric railway in the general transportation of freight does not of itself bring the carrier within the jurisdiction of the Commission over the construc-

tion and extension of railroad lines. No other conclusion can fairly be drawn from the fact that an interurban electric railway, engaged in the general transportation of freight, is expressly kept within the rate-making power given to the Commission by Section 15a, but such a carrier is not mentioned at all in the exception set out in paragraph 22 of section 1. Hence the petitioner, bearing in mind that the Piedmont & Northern performs the service of an interurban electric railway and engages in the general transportation of freight, contends that the railroad is within the exception of paragraph 22 and is at liberty to extend its lines without the Commission's consent. But these considerations do not necessarily lead to the conclusion sought to be reached. It is true that an interurban carrier may be entitled to that descriptive name although it participates in general freight traffic; but it does not follow that every electric carrier so engaged, is an interurban railroad. Freight traffic may be limited in extent and within the scope of a carrier devoted primarily to local business, and at the same time be general in its nature. The carrier may transport the kinds of property usually carried by steam roads in addition to the carriage of baggage, mail, and express, and yet be so restricted in its operations that it may not be properly classified with general steam carriers whose operations cover a wide field. See the discussion in Lackawanna & Wyoming Valley Ry., 105 I. C. C. 178.

The difference in language between the exception in section 15a and in the exception in section 1, par. 22, may not be ignored, but it is accounted for by the fact that in one case Congress was dealing with rates, and in the other, with the construction of new lines. It evidently concluded that if an electric interurban road should build up a business of transporting property to such an extent as to be engaged in the general transportation of freight, it should be included in the general rate adjustment provided in section 15a with a view to uniformity of rates and the connection of the carrier with steam railroads. On the other hand, Congress was of the opinion that so long as an electric carrier should remain independent of steam railroads in its operation and control, and should be

engaged in the local carriage of passengers and freight, as its primary business, the extension of its line would remain a matter of local concern and should be left to the regulation of local authority."

The District Court below expressly followed the reasoning and conclusions of the three judges, although relying upon its own independent judgment entirely apart from any influence of that court's opinion, and in effect adopted Judge Soper's opinion as a correct exposition of the law. (R. 437, 442.)

We submit that it was correct in so doing.

Sections 15a, 73 and 77 are not *in pari materia* with section 1, (18) to (22), and section 20a. They deal with wholly different subject matters. It violates the accepted rules of construction to attempt by too literal and critical a comparison of their provisos to read into the provisos of section 1, paragraph (22), and of section 20a, a breadth of meaning wholly in conflict with the remedial provisions and legislative policies embedded in the essential provisions of those sections. Section 1, paragraphs (18) to (22) and section 20a are *in pari materia.* These provisos are wholly indistinguishable *inter sese.* No difficulty arises from their comparison.

The presumption is that a proviso in a statute refers only to the provision to which it is attached.

*United States v. Morrow,* 266 U. S. 531.

The rule for construing together different sections of a statute as in some degree showing the meaning of both, applies only where the sections are *in pari materia.*

*Hall v. Russell,* 101 U. S. 503.
*United States ex rel. Chott v. Ewing,* 237 U. S. 197.

For the proper construction of a proviso in a statute, consideration need not be limited to the subdivision in

which it is found, but the general purpose of the statute may be taken into account.

*McDonald v. United States,* 279 U. S. 12.

As between two possible interpretations of a proviso in a statute, the court will lean toward that one which withdraws the less cases from the operation of the statute.

*Ryan v. Carter,* 93 U. S. 78.

A proviso carves special exceptions only out of the body of the act. It is to be strictly construed and takes no case out of the enacting clause which does not fairly fall within its terms. Those who set up any such exception must establish it as being within the reason of the exception as well as within the words thereof.

*United States v. Dickson,* 15 Pet. 141.
*Ryan v. Carter,* 93 U. S. 78.
*United States v. Ewing,* 140 U. S. 142.
*Schlemmer v. Buffalo, etc., R. Co.,* 205 U. S. 1.

A statute will not be construed according to a single sentence or member of a sentence, or by detached words and phrases, but according to all the provisions of the act, its object and its policy.

*United States v. Boisdore,* 8 How. 113.
*Gayler v. Wilder,* 10 How. 477.

Effect must be given to all the language employed in a code, and inconsistent expressions are to be harmonized to reach the real intent of the legislature.

*Inglehart v. Inglehart,* 204 U. S. 478.

A doubtful clause in a congressional enactment should be construed so as to effect the general purpose of Congress manifested in the statute.

*Porto Rico R., etc., Co. v. Mor*, 253 U. S. 345.

The literal sense of words and their technical construction yield to the spirit and intention of the enactment.

*The Habana*, 175 U. S. 677.
*Williams v. Gaylord*, 186 U. S. 157.
*American Tobacco Co. v. Werckmeister*, 207 U. S. 284.
*Fleischman Const. Co. v. United States*, 270 U. S. 349.
*Barrett v. Van Pelt*, 268 U. S. 85.

Any secondary policy which Congress may have had in mind in the enactment of a statute ought not to be allowed to give it a construction which would embarrass or defeat the primary policy in view.

*Platt v. Union P. R. Co.*, 99 U. S. 48.

A court will avoid a construction which would render a statute ineffective or inefficient, or which would cause public injury or even inconvenience, if another and more reasonable interpretation is present in the statute.

*Bird v. United States*, 187 U. S. 118.

The primary and essential policy of section 1, paragraphs (18) to (22), and of section 20a, was to put under the jurisdiction of the Commission extensions, abandonments, and security issues of interstate railroads for the purpose of preventing extravagance, unnecessary capital expenditures for duplicate lines not demanded for the public convenience and necessity and which the public would ultimately have to support, to prevent harmful and not needed paralleling of, competition with, and traffic diversion from existing lines, and to assure continuance of operation of lines needed by the public, all to promote and preserve for the people of the United States the great

national transportation system upon which they are dependent. It was no part of the essential purpose to discriminate in favor of railroads operated by electric motive power and to leave them, when engaged in the same essential business as the steam carriers, wholly free to accomplish all the evils against which the legislation was directed.

It was a secondary purpose of paragraph (22) to make clear that the essential regulation did not apply to those purely local tracks which had no substantial relation to the purposes sought to be accomplished, and a secondary purpose of that paragraph and of paragraph (1) of section 20a, to take out of the essential regulation a class of electric railways devoted to a peculiarly local, urban, suburban, and interurban type of business, not within the essential policy of the enactment, not calculated to accomplish the evils sought to be remedied. And this was made doubly sure by expressly denying that the exception gave immunity to any carrier operated as a part of a general steam railroad system of transportation.

Petitioner's argument would attempt, just as the Santa Fe's argument attempted in the *Texas & Pacific Case*, to treat the secondary purpose as the essential purpose, and to broaden the language expressing the secondary purpose to an extent which would be destructive of the primary and essential purpose.

Giving the utmost effect to the argument based on comparison of the provisos in different sections it utterly fails to show any intention of Congress to leave a carrier of the character and the importance of petitioner free to build without authorization such extensions as are here enjoined, in direct violation of the essential policy and purposes of the enactment, merely because its motive power is the more modern electricity rather than the more ancient steam.

**5. All the light to be found in the legislative history of the Transportation Act supports the decision below and shows Congress did not intend to exclude such extensions of such a railroad as here enjoined.**

The petitioner below placed much reliance on the legislative history leading up to the enactment of these various provisions of the Transportation Act, as supporting its position. It filed an elaborate brief reviewing phases of the legislative history, principally to show that by a series of amendments the expression "located or to be located wholly within one state" was moved up from the end to the middle of the sentence of paragraph (22), and the expression "which are not operated as a part (or parts) of a general steam railroad system of transportation" was by amendment uniformly written into that paragraph and into 15a and 20a. The District Court attached this brief to its opinion, as a note, and referred to it in its opinion. (R. 455, 458-486.)

These respondents relied below, and here rely, on the legislative history as supporting their position and as showing that Congress had no intention of excluding such a carrier and such extensions as here involved.

The District Court gave careful consideration to the legislative history. (R. 448, 454-455.) It said (R. 448):

> "Further than that, the help which we have been able to get from the reports of committees and debates in Congress when the Transportation Act was being considered, clearly indicates that Congress never intended to deprive the Commission of jurisdiction over extensions by a major interstate carrier of such importance as the Piedmont and Northern is shown to be."

We have in mind the limitations upon the extent to which the legislative history may be considered, the statement in *Railroad Commission v. Chi., B. & Q. R. Co.*, 257 U. S. 563, 588-589, for instance:

> "Committee reports and explanatory statements of members in charge made in presenting a bill for passage, have been held to be a legitimate aid to the interpretation of a statute where its language is doubtful or obscure * * *
>
> "But when, taking the act as a whole the effect of the language used is clear to the court, extraneous aid like this cannot control the interpretation * * *.
>
> "Such aids are only admissible to solve doubt, and not to create it."

Also we have in mind the statement by the court in *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643, 650:

> "It is true, at least generally, that statements made in debate cannot be used as aids to the construction of a statute. But the fact that throughout the consideration of this legislation there was common agreement in the debate as to the great purpose of the act, may properly be considered in determining what that purpose was and what were the evils sought to be remedied."

A consideration of the legislative history here, not to create doubts but to solve them, entirely supports the decision below. A review of the committee proceedings and of the reports to and debates in the houses of Congress, shows throughout a common agreement as to the great purposes of these provisions of the Transportation Act, as to the evils sought to be remedied, and that no such carrier as petitioner was ever contemplated in the formulation of the exception in paragraph (22). It further shows that no such carrier was comprehended within the common acceptation and meaning of the term "interurban electric railway" in general use at the time, or within any of the representations made to Congress as to such common or customary meaning and use of the term.

There was forcibly brought to the attention of the House Committee (Hearings before House Committee on Inter-

state and Foreign Commerce on H. R. 4378) in considering the various exceptions of "interurban electric railways," the distinction between companies incorporated as street, suburban, or interurban railways and companies incorporated as regular railroads with full powers of eminent domain and other full railroad powers.

Mr. J. D. Cornell, representing the Joplin & Pittsburgh Railway and Kansas City, Kaw Valley & Western Railway, electrically operated railroads, was before the committee contending that his railroads were electric railroads, not "interurbans", and requesting that such railroads be regulated like steam railroads. His roads were shorter and much less important from a national traffic standpoint than the Piedmont and Northern, but they were "chartered as regular railroads under the railroad act of Kansas" (p. 1948), they operated on private rights of way, they filed tariffs and made reports to the Interstate Commerce Commission, they interchanged carload freight with steam roads, had working arrangements, through rates and through billing with them, and 95 per cent of their business was interstate and only 5 per cent intrastate.

Mr. Cornell said to the Committee: "there is not one factor that differs in the operation of our line or the construction except that we are a modern, electrically operated railroad, instead of using steam. * * * Our railroad was financed as an electric railroad, and not an interurban, so that if the term interurban is to be construed as meaning any railroad operated by electricity then you are discriminating against electrically operated railroads, and in time to come, I believe they will all be operated by electricity. * * * Because we are operated by electricity does not, in my opinion, mean that we are an interurban line."

The Chairman of the Committee, Mr. Esch, the author of the bill, said (p. 1949), "Your idea is that you do not believe it should be a classification based on motive power?"

"Mr. Cornell. No; and covered by the word 'interurban.' If the line is a street railroad, not doing a business such as we are, not exchanging business with other lines, it might be an interurban, but we do an interchange business with these other lines that I have spoken of amounting to 600 cars a month. And so I say a railroad of that kind is not an interurban railroad, in my opinion, and I do not believe it is in the opinion of you gentlemen."

Mr. Merritt of the Committee asked (p. 1950): "Is it your view that the act, as it now reads could be construed so as to make you a railroad instead of an interurban?"

Mr. Cornell replied, "Well, undoubtedly, if there is such a thing as an electric railroad, we are one. If not, what are we?"

Mr. Sims of Tennessee, and Mr. Sanders of Indiana, members of the Committee, then had this colloquy with Mr. Cornell, and it is to be noted that Mr. Sanders represented the territory where electric railroads have had a peculiar growth:

> "Mr. Sims. You think the service you perform should be the criterion for your classification?
>
> "Mr. Cornell. Yes, sir. We can bill a shipment from Lawrence (Kan.) to New York or to San Francisco or to any other part of the country.
>
> "Mr. Sims. You are doing as much interstate business as a steam railroad or any other kind of a railroad.
>
> "Mr. Sanders of Indiana. Can you couple on to any kind of a car?
>
> "Mr. Cornell. Yes; we interchange about 600 cars a month.
>
> "Mr. Sanders of Indiana. The ordinary interurban railroad can not do that.
>
> "Mr. Cornell. No.
>
> "Mr. Sanders of Indiana. *What we have always understood by interurban railroad is these long street railroads. We have never understood that a railroad became an interurban just because it used electric power.*

"Mr. Sims. It could not possibly be against the public interest for you to do the service you seek to do and receive the same treatment as though your road were run by steam instead of by electric power?" (Italics added)

The foregoing very clearly shows that the Committee had in mind no classification based merely on motive power and that it drew a complete distinction between an independently operated electric railroad like the Piedmont & Northern and the lines represented by Mr. Cornell, engaged in the same essential interchange freight business as the steam roads, and what was referred to as an "interurban", an expanded street railway extending between cities.

Mr. Denison of Illinois, another state in which electrical railroad development had been extensive, then of his own motion brought up the distinction between charter powers of a regular railroad and the limited powers of the limited railroads to which street, suburban or interurban railways were deemed to belong (pp. 1951-1952) and the following colloquy occurred:

"Mr. Denison. We have a street railroad law and a regular railroad law in our state, and you can incorporate under the street railroad law or the regular railroad law. If you incorporate under the street railroad law you can not condemn private property unless it is shown that it is impossible from an engineering standpoint to run on the streets; and if so, if you can show that, you can take private property; but if it is possible to run on the streets, they can not take private property for their right of way. If they want to run over a private right of way they have the right to incorporate under the railroad act, and then they can condemn what private property they need.

"Mr. Cornell. I believe under the act under which we are incorporated we are a railroad; that is, we are incorporated under the railroad law; and that we have condemned property. * * *

> "Mr. Denison. *There is no question, then, that you are classed as a railroad. A street railroad company has no right to condemn except under the circumstances stated.*" (Italics added.)

On several occasions, Commissioner Clark, representing the Interstate Commerce Commission, appeared before the committees, made statements as to the purposes of the legislation, and as to the Commission's views as to what should be excluded from regulation. He said to the House Committee (Report of House Committee Hearing on H. R. 4378, Volume 1, page 123):

> "Oh, yes. I think it is simply rounding out the enforcement of the principle underlying this that a railroad having entered a given field shall be protected against unreasonable competition by the construction of another line that is not needed. The public would be protected against the obligation to maintain two lines where one was sufficient, and would be further protected in that the carrier having entered the field would be required to occupy it further, in so far as the public interest required."

Commissioner Clark further stated that the capital for railroad construction could be more readily obtained if there were prohibition against unnecessary competition, or the assurance that if a railroad is built it will be "*protected against* what I might term '*piratical building*' by a competitor of a road that is not needed." (Ibid. Volume 1, page 98)

Speaking of the provisions of the Act which are now paragraphs (18) to (22), the Chairman of the House Committee, in presenting the committee report before the house committee of the whole, said:

> "We can get better service by strengthening the existing lines than by creating a rival or parallel line which would diminish the ability of the first line to make further improvements and betterments." (Congressional Record, Vol 58, page 8813)

Senator Cummins, Chairman of the Senate Committee on Interstate and Foreign Commerce, referring to the same provisions of the Act, said on the floor of the Senate:

> "The purpose of this provision of the bill is to recognize as the controlling consideration the right and interest of the public to have reasonable and adequate transportation facilities and to escape payment for transportation facilities that are not needed and are mere duplication of existing facilties." (Congressional Record, Vol. 59, p. 863.)

Explaining the purposes of the regulatory provisions of the bill to the Senate Committee, Commissioner Clark said:

> "In our last annual report we said, with regard to the future of railroads, that whatever line of policy is determined upon, the fundamental aim or purpose should be to secure transportation systems that would be adequate for the Nation's need even in time of stress or peril and that will furnish to the public safe, adequate and efficient transportation at the lowest cost consistent with that service, and to that end there should be the provision for the following:
>
> 1. .....
> 2. .....
> 3. Limitation of railway construction to the necessities and convenience of the Government and of the public and assuring construction to the point of these limitations. The thought underlying the first part of this suggestion is that in some instances, for speculative or competitive reasons, railroads have been built in excess of the reasonable demand and in excess of the necessities of the territory built into, as well as of its reasonably prospective traffic. A railroad once built ordinarily must be operated and permitted to earn a living. The public should not be burdened with the maintenance of two or more railroads when one would substantially answer every legitimate purpose. In this connection it would be desirable that in the exercise of its powers The Congress should say that

no railroad shall be constructed or extended that is to engage or is engaged in interstate commerce unless, in addition to required authority from the state, a certificate of public convenience and necessity, is secured from Federal authority." (Hearing before the Senate Committee on Interstate Commerce, 65th Congress, Third Session, Volume 1, pages 232-3.)

Mr. Charles E. Elmquist, representing the National Association of Railway and Utility Commissioners (the state regulatory bodies) said in the same hearing before the Senate Committee (Ibid. Vol. 1, page 754):

"We favor the limitation of railroad construction to the necessities and convenience of the public and believe that no new construction should be permitted in the absence of a certificate of public convenience and necessity from the proper local authorities. If the construction is to be made by an interstate line, *or will substantially affect interstate commerce,* there can be no objection to having the federal authorities approve the same, but its action should be in addition to, and not exclusive of, the action of local authorities. The location of spur and industrial tracks should be exclusively under the control of local authorities." (Italics added.)

Senator Cummins said on the floor of the Senate: (Congressional Record, Volume 59, part 1, page 138):

"I may remark, however, that it is in this section we have attempted to give the Government the right to prevent the construction of new lines. The very difficulties we have heard urged here so often have arisen at times because railroads have been constructed where and when they ought not to have been constructed. So we have given to the Interstate Commerce Commission, in connection with the board, the jurisdiction to prevent the construction of new lines where obviously the construction of new lines would simply impose another burden upon the public without adding anything to the public welfare."

Thereupon the following colloquy occurred between Senator Cummins and Senator Overman of North Carolina, who had in mind that State's own desire to build an intrastate railroad to its "lost provinces."

> Mr. Overman: "Suppose the State of North Carolina desired to construct a railroad with its convict system up through the mountains of North Carolina to reach a part of the state in which there are no railroad facilties. I understand that this board would have the right to prevent such a railroad from being built?"
>
> Senator Cummins: "No, not at all, if the railroad did not want to do any interstate business."
>
> Mr. Overman: "Suppose they wanted to connect with a line in another state?"
>
> Senator Cummins: "Then it would have to get the consent of the Government."
>
> Mr. Overman: "The State would have to get the consent of the Government?"
>
> Mr. Cummins: "Yes." * * *
>
> Mr. Cummins: "I know, Mr. President, that it shocks one when we think of the full power of regulating commerce, but I really do not know of any way to divide it. We have tried hard and labored earnestly to preserve to the states all the authority that can possibly be preserved. But when the Federal Government undertakes to regulate commerce among the states it cannot divide that authority with the states.
>
> "If the Federal Government believes a road should not be constructed because that road would cast upon the public an unnecessary burden, the responsibility for that decision cannot be shared by the State and Federal Tribunals, and we have thought that justice to the whole country would be more likely to be secured through the jurisdiction of a Federal Tribunal than through the State Tribunal."

These expressions as to the purposes of the legislation are exactly in accord with the purposes declared by this Court in the cases we have cited.

It is perfectly clear in the first place from a reading of the hearings before the Committees that there was no possible agreement as to just what the term "interurban" meant, no accepted or particular classification of railroads being recognized as coming within that term. Representatives of various electrically operated railroads appeared before the committees and none of them could agree on a definition of an "interurban electric railway." Some of them sought to have the legislation exclude their roads, on the ground that they were roads of local importance. Some sought to have the legislation include and regulate their roads, the same as steam roads, because in fact their roads were not of merely local importance, but extensively engaged in the interchange of freight of national importance with steam roads, and hence were roads of national importance.

In discussing the question of electric railroads, (Report of House Committee Hearings on H. R. 4378, Volume 3, page 2940) Commissioner Clark, representing the Interstate Commerce Commission's views, said:

> "It seems to me that any legislation affecting them at all might with propriety contain a definition of what an interurban road is because those who speak for them disagree as to this. The present law prohibits the Commission from establishing a through route as between a steam railroad and an electric passenger railway that does not engage in freight business in addition to its passenger business. I do not think it practicable to draw a line of jurisdiction dependent upon the power used, because electricity is used to an important extent on some of the larger steam railroads. In a good many places they use steam and electricity on the same track. It is reasonable, I think, to assume that electricity will in the course of a few years be used in lieu of steam to an enlarged and enlarging extent, so I think that the only basis on which to prescribe the jurisdiction is the nature of the business done by the carrier irrespective of power employed in moving traffic."

The Chairman: "Logically, interurban would include any railroad running between two cities."

Mr. Clark: "And carried to its logical conclusion, that would include them all, because that is what they all do, run between towns."

Mr. Sims: "Mr. Chairman, you will remember there was a gentleman from Michigan here who made considerable complaint about conditions on his road which was an electric road about the other roads refusing divisions * * *"

Mr. Clark: "Well, that is one of the examples you run across in all matters of this kind. You find one so-called interurban electric road that finds it to its interest to keep outside of the provisions of this act and then you turn to some other section of the country, perhaps another railroad, in physical considerations substantially the same, and you find it invoking the provisions of the act to regulate commerce and the activities of the Commission to require the steam roads to join it in through routes and joint rates * * *"

But Congress did not accept the suggestion and define "what an interurban is." It used the ambiguous and non-definitive word, although there was clear disagreement as to its meaning.

Mr. Elmquist, representing the National Association of Railroad and Public Utilities Commissioners, in urging the adoption of the provision contained in paragraph (22) said to the house committee: (Hearings on H. R. 4378, 1611-1613)

"It is the judgment of the Commissioners that the Interstate Commerce Commission should not be given the power to control the building of *spur and industry tracks or things of that kind.* In most of the states the law expressly gives to the State Commission the power to order any spurs, side or industry tracks when the public convenience and necessity require it. When these tracks are built, the Commission usually fixes the terms upon which they shall be constructed, and they become a part of the system

of the line of railroad. *It is purely a local question.* * * * It would not do, in our judgment, to give to the Interstate Commerce Commission the power to pass upon *these purely local matters* and to deprive the people of the state of any service which they get from their local tribunal. * * *

"The same amendment refers to electric interurban lines. There are a great many electric interurban lines, the average length of which in this country is about 48 miles. Generally speaking, *they perform a local service under the laws of the State*, they are subject to the regulatory powers of the local commissions. We can see no good reason for transferring to the Interstate Commerce Commission the power to determine the extension or the abandonment of *those lines which are specially designed to take care of local service.* You are trying to take care of evils or injuries and it strikes us that you are imposing a greater hardship upon the public, and, perhaps, upon the industry itself, in asking the interested bodies to come here to Washington to have those matters disposed of." (Italics added.)

Mr. Byrd M. Robinson, President American Short Line Association, said (Ibid. page 1974), in arguing that the tap lines and industrial lines should receive the same treatment in connection with their relations to the trunk lines, regardless of stock ownership:

"In view of the facts, we ask that in the act that you prepare the standard fixed for determining the status of all railroads shall be that of service and not of stock ownership."

With regard to electric railroads, he then said:

"That same proposition also applies to the question of motive power; we have introduced three witnesses here for the purpose of showing you that commercial electric railways, the most modern railways that we have in this country, are now being discriminated against and are being very seriously retarded in their growth, for the sole and only reason that they use

electric power. We do not think that fact ought to enter into their status at all. The only question is that of service. * * *"

The American Electric Railway Association, Committee on National Relations, addressed to the committee a letter (Ibid, page 3418) referring to Senate Bill 2906, in which it was said:

"The distinction between steam and electric interurban roads is well known and is constantly recognized by the courts, Congress, and the several state legislatures in dealing with the transportation question. Upward of 60 per cent of all electric railway mileage in the country is strictly city mileage, and not to exceed 5 per cent of the gross earnings of all electric railway, city, surburban and interurban, is derived from interstate traffic.

"No one will contend that city electric railways are to be classed, for purposes of operation, with steam railroads. The interurban electric railways are, to a large extent, affected by their local surroundings; they must depend largely upon revenue earned from local communities served, and they are affected to a greater extent by the competition of motor vehicles, they must be considered by themselves."

We do not undertake to review in detail the various proposed forms and amendments to the forms of the various exclusion provisions. They are quite fully reviewed in the "note" to the opinion of the court below. (R. 458-486.) After a consideration of all of these changes it is quite evident that the difficulty which the committees had was as to the proper form of verbiage in which to express the idea which the committees had in mind and uniformly agreed upon. The only conclusion to be drawn from reading all of the proceedings is that the committees were undertaking to exclude from federal regulation, not only as to extensions of lines, but also as to consolidations, issuance of securities, etc., only those electric railways which were of distinctly local and non-national importance, and that to

achieve this end, the final amendments took the form of using one expression to define that class, to wit, street, suburban and (or) interurban electric railways.

None of the amendments proposed to exclude "electric railways" without the qualifying word, "interurban", and hence none of the forms of amendments undertook to exclude all independently operated electric railroads. Certainly the use of the qualifying word "interurban", especially in immediate conection with "street" and "suburban" ahead of the words "electric railways" was intended to and did define a class different from the class which would have been defined had the act excluded in general terms "electric railways". It will be observed that throughout the changes the committees were not only seeking to define and exclude a certain limited class of electric railways, that is, street, suburban and interurban electric railways, but that in immediate connection with that exclusion they were seeking to define and exclude certain purely local tracks of even steam railroads, not of sufficient importance to conflict with the purposes of the act, to wit, spur, industrial, team, switching and side tracks, wholly within one State.

The form of the language itself, the limitation of the excluded electric railways to the limited class of "street, suburban and interurban electric railways" had already in itself defined a class of railroads of peculiarly local importance, not affecting national transportation sufficiently to come in conflict with the purposes of the act, and thereupon by moving forward ahead of this expression the qualifying clause "located wholly within one state", the committees more clearly limited the exclusion of spur, industrial team, switching or side tracks, even of steam roads, to those of purely local significance.

Finally, it appears that after some differences as to the form of language, but none as to the idea sought to be expressed, it was agreed, first in connection with the consolidation provisions, to doubly assure the limitation of

"street, suburban and interurban electric railways" to such railways as were of peculiarly local importance, by adding the expression "which are not operated as a part or parts of a general steam railroad system of transportation."

This is shown by Congressional Record, Volume 59, part 1, page 587 *et seq.* In connection with the consolidation provision in Senate Bill 3288, Senator Watson offered the amendment before the committee of the whole, substituting the language "street, suburban and interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation."

In explanation of this amendment, Senator Cummins said to the Committee of the Whole:

> "Mr. President, I desire to say that there has been a good deal of controversy *with regard to the proper way to express the idea the committee had,* and so far as I am concerned, I am quite as well satisfied with the form used in the amendment as with the form used in the bill itself. I have no objection to the amendment." (Italics added.)

That amendment was adopted without any further discussion or debate, and then Senator Watson offered two other amendments "to make the other sections of the bill conform to the section which was just amended". The first of these two amendments wrote the same words into the exception provision as to extensions, now paragraph (22). As to that, Senator Cummins merely said, "The same observation applies to that amendment, it makes the bill uniform in that respect." And that amendment was adopted without debate to make the language uniform with that of the consolidation provision amendment.

The second of these two amendments, applying, among other things, to security issues, labor disputes, etc., was similarly adopted without debate, writing the same language into this provision, and Senator Cummins merely

said, "The two former amendments having been adopted, this one ought to be, in order to keep the bill in harmony."

After the adoption of these amendments, Senator Smith of South Carolina offered an amendment to strike out all of section 34, dealing with extensions and abandonments, on the ground that it would stop railroad construction entirely, and encroach upon the sovereignty of the state. (Congressional Record, Vol. 59, part 1, page 746.)

On page 749, Senator Cummins, in charge of the bill on the floor, said:

> "I do not believe, therefore, in the theory of the Senator from South Carolina, that if the people of his state desire to build a railroad and should come to Washington and lay the venture before the Interstate Commerce Commission, the Interstate Commerce Commission would deny the authority because the interest of some existing railroad might be served by refusing the authority; I cannot conceive of such a thing. * * *
>
> "We propose here to grant to a governmental body the right to survey the situation, and then say, as to a railroad which is to be a common carrier and to be engaged in interstate commerce, whether under the circumstances, looking at the future of the community and the opportunity for traffic and everything of that sort, it is a fair and reasonable venture upon which the people of the country will be called upon eventually to pay a return. * * *
>
> "Mr. President, I do not think it is quite fair to test the merit of the propositions contained in this bill, by reference to some of the imperfections of government. This is a plain, easily understood proposition as to whether the construction of railroads which will carry interstate commerce for the future, and which must be supported by the imposition of rates which will return a fair interest upon the investment or value of the property shall be placed under public control. That is the plain, easily understood proposition, I think every Senator has thought sufficiently about the matter and is sufficiently acquainted not only with the legislation of his own state, but

with the policy of the country generally to record an intelligent judgment upon the proposal; I am quite willing to take a vote upon it."

Senator Jones of Washington then asked Senator Cummins again if the bill in its final form would prevent the Northern Pacific from building a road between two points wholly within the State of Washington, but not connected with its main line, without securing a certificate.

Senator Cummins replied: "That depends entirely on whether or not it desires to do an interstate business. This does not relate at all to a railroad that is willing to content itself with purely intrastate traffic; but if the road carried commerce between the states, then I think it would be compelled to apply to the Commission under this section." (Ibid, page 750.)

Thereupon the amendment of Senator Smith of South Carolina was rejected. (Ibid, page 866.)

The following conclusions are to be drawn from a careful study of all the voluminous proceedings before the committees and of the debates and proceedings on the floors of Congress:

There was never any intention to make motive power a basis of classification for exclusion; there was never any intention to exclude all electric railroads; the *rationale* for exclusion of all constructions referred to in the final form of paragraph (22) was to exclude those constructions which would be of purely local importance and which would not have sufficient effect upon transportation of national importance to come into conflict with the purposes of the legislation; that in pursuance of that *rationale* only such railroads were excluded as come within the very limited class "street, suburban and interurban electric railways" in the first place; and that finally to make assurance doubly sure that no construction of national importance should be excluded from the regulation, the additional qualifying words "which are not operated as a part or parts

of a general steam railroad system of transportation" were added as an additional limitation to the exclusion.

Finally, it is clear that by the very use of the word "interurban" ahead of the words "electric railways" and in immediate connection with the words "street" and "suburban", the intention was to confine the exclusion to those long extended street railways, engaged essentially in an interurban extension of street railway business, railroads having the limited powers of street railway corporations, and engaged in the essential local business of street railway corporations, even if such essential local business should include general transportation of local freight, the conclusion being quite clear that there was no intention to exclude any construction which would have a substantial effect upon national commerce, or upon the national system of transportation.

We think it is quite clear from the legislative history that there was never an intention to exclude such a railroad as the Piedmont & Northern, almost all of whose business is interstate, interchange business of distinctly national importance, strongly competing with the trunk line steam railroads of the territory for national traffic.

**6. General usage of the term "interurban electric railways" at and prior to the passage of the Transportation Act did not include or contemplate such a railroad as petitioner; and if it had it would not control the meaning of the statutory language.**

The foregoing review of the legislative proceedings is eloquent that general usage at the time did not contemplate such a railroad as petitioner, engaged in business of the character done by it, as an "interurban electric railway." If there had been any such general usage or meaning of the term, it would have been brought to the attention of Congress during the exhaustive investigation it conducted.

Footnote 4 to the Court's opinion in *United States v. Village of Hubbard*, 266 U. S. 474, 478, is eloquent to the same effect, as we have already pointed out.

Petitioner below offered as an expert witness Professor Richey, Professor of Electric Railroad Engineering at Worcester Polytechnic Institute, who had had a long experience with electric roads in the middle west. (R. 299.) He traced the history of the progressive development from electric urban lines, to suburban lines, and then to interurban lines. (R. 300-305.) He described particularly certain lines in the middle west with which he was familiar, testified to inroads on their passenger traffic by automobile beginning in 1913 to 1917 and that this resulted into their going into some freight business (R. 305-306); that a good many of those lines interchanged freight cars with connecting steam railroads; that those electric roads competed with steam roads for passenger and freight traffic (R. 307); that they physically connected with steam roads and handled interstate freight (R. 307). He described some such roads of considerable trackage. (R. 309) Throughout all his discussion and description of those electric lines in the middle west, he referred to them as "interurbans" and as commonly known by that term. (R. 300-309.) He then gave a detailed description of the petitioner's line based upon inspection. (R. 310-324.) He compared the construction and equipment of petitioner as being similar to the middle western lines referred to and different from electrified portions of steam railroads.

He ended his direct examination with the assertion of the opinion that there were "three or probably four general classes of electric railways in the United States prior to 1920": 1. Urban railways (street railways and rapid transit lines); 2. Suburban railways, operating in cities and to adjacent suburbs; 3. Interurban railways, "which operated between cities and towns, with no built up settlement between them, that is, between separate cities and

towns;" and 4. Electrified sections of main line steam railroads. In line with his testimony, he asserted that "interurban electric railway" had acquired a technical and generally accepted meaning in the electric railway industry in the United States prior to 1920. (R. 324.)

He was not asked by petitioner's counsel, and did not testify, what that meaning was. The only possible inference from his testimony is that, if there was such a technical and generally accepted meaning of the term, it referred to electric railways of the character of those in the middle west to which most of his testimony was devoted and which he characterized as "interurbans."

On cross-examination he admitted that none of those roads had any such interchange freight business as the Piedmont & Northern has (R. 326); that Union Traction Company of Indiana, one of the principal of those lines, had only about 17 per cent of its revenues from freight; that Detroit United Railway had only about 9 per cent of its revenues from freight, doing a passenger business of over four million dollars a year (R. 328); and that Terre Haute, Indianapolis & Eastern and the Indianapolis & Cincinnati had freight and passenger revenues in about the same ratio (R. 329); that in 1917 the reports for all those railroads showed about 10.3 per cent freight revenues to total revenues and in 1920 about 12.1 (R. 329).

Assuming, as his evidence would show, that "interurban electric railways" had a technical and generally accepted meaning as comprising that class of railways about which he testified, at the time of the enactment of the Transportation Act, then clearly no such railroad as the Piedmont & Northern, no railroad doing such a business as it does, was known within that term. The electric railways of the general class referred to by him as interurbans were predominantly and distinctly passenger carriers, their essential service being interurban passenger service, a mere extension of suburban service. To only a minor and rela-

tively unimportant extent had any of them gone into freight business. Where any large part of the total passenger and freight traffic was technically interstate it was due to the fact that the line ran between cities across a state line. (R. 326.)

Even the Piedmont & Northern was, until 1920, almost as heavily engaged in interurban passenger traffic as in freight traffic. But beginning with that year its freight traffic became increasingly predominant and important. In 1927, when it applied to the Commission for certificate for these extensions, its freight revenues were $2,340,809.58 and its passenger revenues only $124,154.28. (R. 353.) And the purpose of the extension was to divert from other interstate carriers and gain for itself $3,597,384.00 of carload freight revenues, from national traffic, the first year, and amounts in succeeding years increasing annually at the rate of 8.4 per cent. (R. 134-137.)

The question before the Commission in the proceeding there was the status of the Piedmont & Northern at the time of the application, 1927. Nothing of its character was known as an "interurban electric railway" when the Transportation Act was passed. Congress could not have contemplated a road of its character when it used the term.

The question in this suit is the status of petitioner when it began to build extensions without certificate in 1930. Then its freight revenues were 94.5 per cent of total revenues (R. 417) and 95.7 per cent of those freight revenues were from interline interchange freight moving all over the country (R. 418).

Certainly no such railroad was known as an interurban in and prior to 1920.

In plain, ordinary acceptation and meaning of the word it is not an interurban. Its business is not a "between city" business. It is a between state, trans-state, and national business. Every steam railroad in the United States is an interurban in the same sense in which peti-

tioner can claim to be. Unless something different from that literal sense was meant by the term as used in paragraph (22), Congress would not have used it, would have simply excluded "electric railways" etc., without the modifying word "interurban."

Not as controlling the construction of the act of Congress in any way, but as bearing on the question of what character of railroad was generally and customarily known and described as an interurban electric railway in 1920 and prior thereto, it is significant that petitioner was not and is not classed as an interurban by the law of South Carolina, its parent state, or by the law of North Carolina, the other state in which it operates. The statutory definition of interurban electric railways excludes it from that class in South Carolina, and it has been classified in the same category as freight carrying steam railroads by the Supreme Court of North Carolina.

The South Carolina Code contained in 1920 and still contains a rather complete regulatory chapter covering "Interurban and Street Railways," (Chapter 161, Code of Laws of South Carolina, 1932, sections 8479-8506; Code of 1922, sections 5038-5064). It includes employer's liability provisions, regulations as to fenders and vestibules on street railways and vestibules on interurban railways, heating of cars, provisions for arbitration of labor disputes, separate accommodations for the races, for permitting standing in aisles, police powers of conductors and employees, safety appliance and equipment provisions, etc. And section 8432 (section 5041, Code 1922) defines "street railways" and interurban railways" as follows:

> " 'Street Railway' shall be construed to include all railroads and railways operated by electricity, whose main business consists in the transportation of passengers between different points within the limits of a municipality; and *the phrases 'Interurban Railroad' or 'Interurban Railway' shall be construed to include all railroads and railways operated by electricity whose*

*main business consists in the transportation of passengers from one municipality to another.*" (Italics ours.)

Section 8488 (section 5047, Code 1922) makes that definition of interurban railroads and railways apply to the whole chapter.

The Piedmont & Northern was not, therefore, in 1920 and is not now an interurban electric railway within the statutory definition of the law of its parent state. It was not and is not subject to that state's code regulating interurbans. Certainly there was no customary, common, or accepted understanding in South Carolina that the petitioner, or any electric railroad engaged in the "main business" in which petitioner is engaged, was an "interurban electric railway." The law of that state declares it is not an interurban.

We submit that the South Carolina statutory definition is helpful, persuasive, and an expression of common understanding of the term. It is entirely logical, in making classification depend upon the "main business" done by a carrier. Classification in South Carolina does not depend upon the mere incident of motive power. A railroad in that state is not an "interurban electric railway" simply because it is motivated by electricity and operates between cities on its line.

Similarly the law of North Carolina, the other state in which petitioner operates and seeks to extend, recognizes no classification based on the mere incident of motive power. And the Supreme Court of North Carolina has classed the petitioner's North Carolina line, upon the basis of the character of business done, in the same category as steam railroads, rather than in that of street, suburban, or interurban electric railways. *Kirkpatrick v. Piedmont Traction Company,* 170 N. C. 477.

The organizers, builders and operators of petitioner's present lines, built and first operated them through prede-

cessor corporations, the South Carolina line through Greenville, Spartanburg and Anderson Railway Co., a South Carolina corporation, and the North Carolina line through Piedmont Traction Company, a North Carolina corporation. (R. 408.) After the two lines were in operation, the owners incorporated petitioner, Piedmont & Northern Railway Company, a South Carolina corporation, and it took title to the properties and succeeded to the rights of the two predecessors in 1914. (R. 408-409.)

The case of *Kirkpatrick v. Piedmont Traction Co., supra,* arose just before the corporate change, and involved the status and classification, under the law of North Carolina, of petitioner's North Carolina line. Although the Piedmont Traction Company was chartered as a street railway company with the limited powers of such railway (R. 405, finding 5), whereas the Piedmont & Northern was chartered as a regular railroad, with full power of eminent domain and all powers of a railroad (R. 403, finding 1), the North Carolina court in that case held that the former's business had stepped out of the generally understood class of street railway business and into the class of *interchange freight business done by steam railroads,* and classified it in the same category with steam railroads.

The question at issue was whether the Piedmont Traction Company's line along Franklin Avenue in Gastonia constituted an additional burden on the property of Kirkpatrick, an abutting land owner, for which he could recover damages. It had already been held in North Carolina that a street railway does not constitute an additional servitude for which an abutting land owner is entitled to compensation but that a steam railroad does. The Traction Company contended that it was a street railway and that hence its line in Franklin Street was not an additional servitude. The court said:

> "This action is brought to recover of the defendant damages for operating a commercial railroad, con-

sisting of freight traffic as well as passenger traffic, along Franklin Avenue in the town of Gastonia, upon which the plaintiff lives in a house owned by him on a lot abutting the said avenue. The defendant operates a street car line of the city of Gastonia. The defendant also operates freight trains and interurban passenger trains over this avenue in front of plaintiff's house. The defendant's line of railroad runs from Gastonia to Charlotte, N. C. Its interurban passengers cars and trains carry passengers between these two points and intermediate points. Its freight trains likewise handle freight between these two points and intermediate points, and, in addition, it transfers its freight cars to the Seaboard Air Line Railway, the Southern Railway and the Carolina and Northwestern, and these roads in turn transfer cars from their lines, loaded with freight, to the defendant's lines. It is a regular standard gauge railway, using electricity as a motive power instead of steam. * * *

"We are of opinion that, from the nature and description of the defendant's business, as given in the record, and the manner in which it operates its freight trains and interurban passenger trains, it should be classed as a 'steam railway' and cannot be regarded as the ordinary street railway. The matter is not to be determined by the character of the motive power, but rather by the character of the business done, as well as the injury inflicted by it.

"The testimony in this case tends to prove that the passenger cars used by the defendant in its interurban service are about the same size as those used on the great railroads of the country. These interurban passenger trains carry baggage, mail and other things that are carried by other passenger railways. The freight cars used by the defendant are similar to cars used on the ordinary railroads of the country and of the same standard gauge. These freight cars are transferred to other lines and the freight cars of other lines are transferred to this defendant's line in all respect as is the custom between the railroads of the country. The freight cars are the usual standard cars—about sixty feet long."

That decision was rendered December 15, 1915, over four years before the enactment of the Transportation Act. At that time the law of North Carolina understood petitioner's line, in view of the main business done, to be in the category of steam railroads.

From all the foregoing it results, we submit, that there is no fact basis in the record for the contention that the common understanding and generally accepted meaning of the term "interurban electric railway," in and prior to 1920, comprised, included, or contemplated such a railroad, doing such a business, as petitioner's, either in South Carolina, North Carolina, or the United States. On the other hand, it is clear that petitioner does not come within the general acceptation of the meaning of that term.

But, in any event, the holding in the *Texas & Pacific Case* would reject such considerations as not controlling, even if the fact existed, and would require construction of the term in paragraph (22) in the light of, and in furtherance of, the remedial purposes of the legislation, not in the light of loose and general usage of the term in other connections.

It seems plain that the status of petitioner, for purpose of classification as falling within paragraphs (18) to (21) or within the proviso of paragraph (22), is to be determined upon a consideration of its predominant and essential business as a carrier, its "main business." The fact that a trivial and inconsequential 3 or 4 per cent of its whole business may have the peculiar nature and characteristics of "interurban" business cannot control its classification. (See Finding V. 5, R. 423-424.)

**7. The decision below is in accord with the later and more authoritative decisions of the Commission and with the holdings of the lower federal courts.**

Some of the earlier Commission opinions used the word "interurban" loosely and in other connections in a way

which may be said to be in conflict with its later decisions in the *Piedmont & Northern Case*, 138 I. C. C. 363.

Rather than review those decisions ourselves, it seems sufficient to quote from the opinion of the court of three judges in the former suit, 30 F. (2d) 421, 434, 436. It was there said, with foot-notes as quoted:

> "The petitioner cites opinions of the Interstate Commerce Commission and the United States Railroad Labor Board in which electric roads, some of them having a much greater mileage than the Piedmont & Northern, have been described as interurban.[5] Most of these cases involved applications for through routes and joint rates with steam roads. The extent to which the electric carrier was engaged in the general transportation of freight was discussed, since electric street railways, not so engaged, are outside

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[5] Chicago & Milwaukee Elec. R. Co. v. Illinois Cent. R. Co., 13 I. C. C. 20; Cedar Rapids & Iowa C. R. & Light Co. v. Chicago & N. W. R. Co., 13 I. C. C. 250; Cincinnati & Columbus Traction Co. v. B. & O. Southwestern R. R. Co., 20 I. C. C. 486; St. Louis, Springfield & Peoria R. R. v. P. & U. Ry. Co., 26 I. C. C. 226; Louisville Board of Trade v. Indianapolis, Columbus & Southern Traction Co., 27 I. C. C. 499; Jurisdiction over Urban Electric Lines, 33 I. C. C. 536; Chicago, Ottawa & Peoria Ry. Co. v. Chicago & Northwestern Ry. Co., 33 I. C. C. 573; St. Louis, Mo.-Illinois Passenger Fares, 41 I. C. C. 584; Lourie Mfg. Co. v. Cincinnati Northern R. R. Co., 42 I. C. C. 448; U. S. R. R. Labor Board, Dec. No. 33, Dec. 11, 1920.

The Illinois Traction System is described (St. Louis, S. & P. R. Co. v. P. & P. U. Ry. Co., 26 I. C. C. 226; St. Louis, Mo.-Illinois Passenger Fares, 41 I. C. C. 584; Lourie Mfg. Co. v. Cincinnati Northern R. Co., 42 I. C. C. 448), as an aggregation of railroads which operates about 425 miles of standard-gauge electric lines in Illinois and owns some 900 cars, of which 775 are freight cars. The system has through routes and joint rates with steam roads to the west, northwest, and southwest; in 1915 its gross freight revenue was about $400,000. The decision of the Labor Board refers to "Pacific Electric Railway Company, operating upward of 600 miles of road; the Fort Dodge, Des Moines and Southern R. R., owning 2400 box and coal cars, and the Spokane & Inland Empire R. R., crossing State lines and operating passenger and freight trains."

The Memorandum concerning Electric Railway Companies Reporting to the Interstate Commerce Commission for the Year 1917, issued by the Bureau of Statistics of the Commission May 12, 1919, referred to in United States v. Village of Hubbard, 266 U. S. 474, 478, note 4 (45 S. Ct. 160, 69 L. Ed. 389), and discussed in the petitioner's brief, gives the mileage operated and the distribution of operating revenues for 267 roads. With the exception of certain railroads devoted to special service, such as terminal and belt line railroads, there were few of any importance in 1917 whose freight revenues formed so large a part of the whole as did those of the Piedmont & Northern. The reports do not show how much of the revenues were derived from interstate or interchange business.

the purview of the act. But the Commission was not called upon to draw the line between an interurban and a steam railroad. * * *

"The construction placed by the Interstate Commerce Commission upon the language contained in the exception in paragraph 22 of section 1, and in section 20a of the act, has not been uniform. On October 12, 1920, the Commission ruled that it did not have jurisdiction over the Piedmont & Northern in regard to the issuance of securities because the road was covered by the exception in section 20a. This ruling, however, was ex parte, and no opinion seems to have been filed. The Application of Michigan United Railways Co., 67 I. C. C. 452, for a certificate of public convenience and necessity, was considered on April 21, 1921. The railroad serves cities in Michigan and adjacent territory and has a physical connection for interchange of business with the Pere Marquette Railway. The Commission's memorandum of 1917 shows that it is 404.16 miles in length, and that its passenger revenues were $3,402,002.27, and freight revenues, $392,633.58, in that year. It was decided that the railroad was covered by the exception in paragraph 22 of section 1 of the act.

"On the other hand, the Commission decided in 1922 that it had jurisdiction under section 20a over the Sacramento Northern Ry. Co., 71 I. C. C. 653, and Id., 79 I. C. C. 782. This company owned and operated an electric railway extending 165 miles northerly from Sacramento, which was equipped with locomotives capable of hauling from 40 to 50 loaded freight cars. The most important part of its business was through passenger and freight traffic, originating on its lines and delivered to steam trunk lines for interstate transportation. The Commission, answering the contention that the road was excluded from its authority as an interurban railroad, said: 'We are by no means convinced, however, that the Northern is an interurban electric railway as that term is used in the statute. Much of the transportation service rendered by it, no doubt, is similar to that rendered by electric interurban railways. The service

of such railways, however, is distinguished by its local and limited character and by the fact that the bulk of their revenues are derived from the transportation of passengers.[6] Their facilities for handling freight are usually inadequate or lacking so as to disable them from engaging in its general transportation. The amount of business interchanged by them with connecting carriers is ordinarily very small. Congress obviously did not intend to exclude all electric railways from the operation of Section 20a. If the Western Pacific were to completely electrify its system it would not thereby become a "street, suburban, or interurban electric railway." Some of its operations might partake of the nature of street, suburban, or interurban railway service, but its business as a whole would be of a far broader character. Similarly it appears from the facts of record that the Sacramento Northern is more than an interurban carrier as that term is generally understood.' See, also, Ex parte No. 38, 122 I. C. C. 414.

"It is our conclusion that the more recent rulings of the Commission conform to the purpose of the statute and point the way to the correct classification of the Piedmont & Northern."

We submit that the later decisions of the Commission, including the decision in the *Sacramento Northern Case*, 71 I. C. C. 653, 79 I. C. C. 782, and in the *Piedmont & Northern Case*, 138 I. C. C. 363, do, as declared by Judge Soper, "conform to the purpose of the statute and point the way to the correct classification of the petitioner." They are persuasive in support of the decision below. The Commission, "a tribunal appointed by law and informed

[6] The statement that the service of an interurban railroad is distinguished by its local and limited character is not disputed. It is borne out by the opinions of the Commission, of the Labor Board, and by statements and testimony offered to the Congressional Committee when the Transportation Act of 1920 was under consideration. See the statement of the American Electric Railway Association, and of the National Association of Railroad and Utilities Commissioners, in Hearings before House Committee on Interstate and Foreign Commerce, H. R. 4378, volume 3, p. 2418; volume 2, pp. 1611, 1613, 1629.

by experience,"* ought to have a very good judgment and knowledge as to what is an "interurban electric railway."

The decision below is in entire accord with other analogous decisions by the lower federal courts.

*Detroit & M. Ry. Co. v. Boyne City, G. & A. R. Co.*, 286 Fed. 540, was one of the earliest cases in which a federal court construed paragraph (22). The defendant was undertaking to build certain trackage without first having procured certificate under paragraph (18). The plaintiff sued for injunction. The case was on all fours with the *Texas & Pacific Case*, the contention of defendant being that the proposed trackage would be a "spur" or "industrial" track located wholly within one state, within the meaning of paragraph (22). The court heard testimony covering all the details as to the character and business of the defendant, its competition with other lines, and the territory sought to be invaded and served by the projected trackage.

That court wrote a well reasoned opinion. It construed the statute in the light of the legislative purpose, particularly stressing Commissioner Clark's statements to the Committees which we have above quoted, and outlined the particular purposes of paragraph (22) substantially as this Court did in the *Texas & Pacific Case*. It rejected, as not controlling, various definitions of "spur" and "industrial" tracks, and held that the trackage in question was within paragraph (18) and not exempt under paragraph (22), saying:

> "Considering all of the facts and circumstances of the present case, including the proposed operation of entire trains over the proposed track and the main line of defendant in continuous transportation and without switching movements or charges; considering the sidings and public loading stations to be constructed and used in connection with said track;

*Illinois Central R. Co. v. I. C. C., 206 U. S. 441, 454.

considering the expense of the proposed undertaking; considering the competitive character and results of the contemplated use and operation of said track and trains; considering the fact that the proposed track and train service will be between points where the competing railroad now maintains stations and between which the competing railroad now operates a regular train service; and in view of the entire record,—I reach the conclusion that such proposed track has the characteristics of, and constitutes, not a 'spur track', but a new 'line' more specifically, an extension or a branch line."

In the recent case of *Pennsylvania R. Co. v. United States*, 40 F. (2d) 921, a court of three judges, in a suit brought to set aside an order of the Commission granting a certificate for an extension, followed the *Texas & Pacific Case* and the *Boyne City R. Co. Case, supra,* in its declaration of the purposes of the provisions of the Act.

The decision in *Piedmont & Northern Ry. Co. v. United States,* 30 F. (2d) 421, and the decision of the District Court below in this case are in entire harmony with all these decisions and with the later and more authoritative decisions by the Commission.

This Court is not bound by administrative interpretation even where it has been uniform. And where it has not been uniform it is entitled to less weight. *United States v. Missouri P. R. Co.*, 278 U. S. 269, 280.

Certainly the later and better reasoned interpretation by the administrative body is entitled to more weight than the earlier, conflicting and less carefully considered interpretation.

**8. Informal treatment of petitioner, in other connections, as an interurban electric railway, by the Commission prior to its formal decision in 138 I. C. C. 363, the ruling of the old Railway Labor Board, holding that petitioner was excluded from its jurisdiction under section 300 of the Transportation Act, and the fact that the Census Bureau and the Post Office Department have classed petitioner as "interurban," are without present significance.**

Petitioner relies on certain routine and informal action of the Commission, prior to its formal decision in 138 I. C. C. 363, as indicating that the Commission treated it in certain respects as an interurban electric railway. (R. 173, 362-365, 450-451.)

It particularly relies upon the informal ruling, in correspondence with the auditor of the petitioner, made by Secretary G. B. McGinty, of the Commission, that, while Section 15a applied to it, Section 20a did not. (R. 362-365.)

This informal treatment can have no present significance in view of the holding by the full Commission in 138 I. C. C. 363, upon full development of the facts and after full hearings and arguments, that petitioner is subject to paragraph (18) and is not excepted by paragraph (22). The report and order of the Commission are set out in full in the record. (R. 8-58.)

As this Court said in the former Piedmont & Northern appeal, 280 U. S. 469, 476, not even formal action by the Commission can operate as *res judicata* of the question. Certainly informal, *ex parte* action is without significance.

The petitioner places some reliance upon the decision of the former Labor Board in *Brotherhood of Locomotive Engineers, et al. v. Spokane & Eastern Railway, et al.*, decision No. 33 (docket 26-a, December 11, 1920) wherein that Board held that the Piedmont & Northern and certain other electric carriers were excluded from the Board's jurisdiction as being "street, interurban and

suburban electric railway(s) not operated as a part of a general railroad system of transportation," within the meaning of section 300 of the Transportation Act, since repealed by section 14 of the Railway Labor Act of 1926 (44 Stat. L. 577, 45 U. S. C. 163).

Petitioner, we suppose, does not rely on this decision as authority, but only treats it as having some persuasive effect. The Labor Board was passing upon another statute, dictated by other considerations. Its decision does not compare, for persuasive force, with the decision of the Interstate Commerce Commission that the Piedmont & Northern is not an "interurban electric railway" within the meaning of paragraph (22).

The Labor Board's decision is very far from having the persuasive force of the decision of the three judges, two circuit judges and one district judge sitting, in 30 F. (2d) 421. That district judge is now circuit judge and that special court was practically the Fourth Circuit Court of Appeals.

The Labor Board's decision is far from having the persuasive force of the Commission's decision in *Proposed Control of Sacramento Northern Railway by W. P. R. Co.*, 71 I. C. C. 653, to which we have previously referred.

The fact that the Post Office Department has compensated the petitioner for mail service as an interurban electric railway at rates fixed by the Commission in the *Electric Railway Mail Case* is certainly without significance here. There is nothing to indicate that the question of its status, whether it is an interurban electric within the meaning of the Act providing for railway mail pay service on urban and interurban electric railways, 39 U. S. C. 569-570, was ever raised or argued with the Post Office Department. Such question has not been litigated. Such treatment by the Department, with apparent full acquiescence of petitioner, can have no significance. Otherwise, by acquiescing in such treatment by the Post-

master General, petitioner could lift itself by its own boot straps into freedom to extend without certificate.

It needs nothing more than statement of the contention to show that the fact that the Census Bureau has classified and enumerated petitioner or other roads somewhat similar to it as interurban can have no significance as to the question here raised.

## II.

**Petitioner is "Operated as a Part or Parts of a General Steam Railroad System of Transportation" Within the Meaning of the Limitation Upon the Exclusion in Paragraph (22), and Hence is Within Paragraph (18). Thus in Any Event the Extensions Were Properly Enjoined.**

Throughout the argument under Point I it has been necessary to suggest the argument under this point, since the latter has a material bearing on the former.

Paragraph (22) does not merely exclude "interurban electric railways." The qualification keeps out of the exclusion provision, and keeps within the regulatory provisions of paragraphs (18) to (21), any electric railroad, even an interurban electric railway, if it is "operated as a part or parts of a general steam railroad system of transportation."

What is a *general* steam railroad system of transportation? What does it mean to be "operated as a part or parts" of such a general system? What was the purpose of Congress in restricting the exclusion proviso regarding "interurban electric railways," in section 1, paragraph (22), and in sections 15a and 20a, uniformly, by adding this restricting clause? These are questions just as important to this case as the question as to what Congress meant or understood by "interurban electric railways."

Petitioner, as we have already pointed out, cannot pre-

vail on this appeal unless it establishes: not only (1) that it is an "interurban electric railway" within the meaning of those words as used; but also (2) that it is "not operated as a part or parts of a general steam railroad system of transportation."

The review of the legislative history we have made above, and that contained in the "note" to the lower court's opinion, a brief furnished by petitioner (R. 458-486), show, we think conclusively, that Congress recognized that there was ambiguity in the words "interurban electric railway" and added the additional restrictive words, *ex abundanta cautela,* to make it perfectly clear that it was not intended by either exclusion provision to except from regulation any interstate electric carrier, whether within or without the ambiguous term "interurban," if it was really operated as a part of that which the whole regulatory purpose was to protect and preserve, to-wit: the general steam railroad system of transportation.

The only possible answer to this thought is that when Congress said "a general steam railroad system of transportation" it meant a particular steam railroad system. The English language has just one word apt to express clearly that a particular steam railroad system was not meant. That is the word "general." And Congress used that word.

The Commission in 138 I. C. C. 363 (R. 13-17) did not consider this question at all. It merely held that petitioner was not an "interurban electric railway" and hence that the application was within its jurisdiction.

The three judge court, in 30 F. (2d) 421, and the court below (R. 448) did consider this question, upon these respondents' contentions presented in pleadings and arguments in both cases. But we submit that neither court gave the question sufficiently careful attention, because both were deciding that the Piedmont & Northern was not an "interurban electric railway," in the light of

which decision the second question became academic. However, it is interesting to analyze just what was said. The court below was very brief. It said (R. 448):

> "We finally conclude that while it is closely tied up by existing traffic agreements, some of them highly preferential, yet its independence of control and operation is such as to keep us from saying that it is operated as a part of any general steam railroad system of transportation."

That throws no light on the reasoning upon which that conclusion was reached. It merely evidences that the court concluded that "a general steam railroad system of transportation" meant a particular steam railroad. Petitioner admittedly is not operated or owned by any steam railroad, although its operating officers themselves operate an interstate steam railroad, the Durham & Southern, owned by closely affiliated interest, and having a similar preferential contract with the Seaboard. (R. 265-266, 339-340, 422-423.) The two railroads have joint offices (R. 281), as well as the same principal operating officers.

The District Court pointedly commented on this intimate relation with the Durham & Southern as indicating the importance of the Piedmont & Northern in through freight transportation. (R. 456.)

The three judge court, however, did show its reasoning in concluding that the Piedmont & Northern was not "operated as a part or parts of a general steam railroad system of transportation."

It said, 30 F. (2d) 425-426:

> "The operation of the road, it is admitted, is entirely in the hands of the Piedmont & Northern Railway Company, independent of any other railroad corporation; and it is not a part of any other system of transportation, unless that phrase is taken in a broad sense to mean the whole aggregation or network of railways in the United States which are

physically connected for the interchange of business. In this sense the petitioner is a part of a railroad system, since, as will presently appear, it has physical connections and through traffic arrangements with steam roads which give it access to all parts of the country. In this sense the term "railway system" has been used in a number of cases by the Supreme Court, as for instance in Texas & Pac. Ry. v. Gulf, etc., Ry. Co., 270 U. S. 266, page 277, 46 S. Ct. 263, 266 (70 L. Ed. 578), where Mr. Justice Brandeis said: "By that measure (Transportation Act, 1920), Congress undertook to develop and maintain, for the people of the United States, an adequate railway system." See, also, Railroad Commission of Wisconsin v. C., B. & Q. R. Co., 257 U. S. 563, 589, 42 S. Ct. 232, 66 L. Ed. 371, 22 A. L. R. 1086; Dayton-Goose Creek Ry. Co. v. U. S., 263 U. S. 456, 478, 44 S. Ct. 169, 68 L. Ed. 388, 33 A. L. R. 472.

"But, on the other hand, the term has also been used in a more restricted sense both by Congress and by the federal courts, and in this sense, something more than physical connections and through traffic arrangements must exist between railroads to constitute them parts of the same railway system. There must be also unity of ownership or unity of management and control."

Supporting the narrower view of the meaning "system" as a particular railroad system, under common control, common management, and common operation, it cited various statutory uses of "system" in that sense and various decisions of the Commission construing the word in the narrower sense, 30 F. (2d) 426-427.

Manifestly there are the two senses of the word "system," a broader meaning, and the narrow meaning of a particular railroad system. If Congress had used the expression, "not operated as a part or parts of a steam railroad system," it might well have been argued that it meant a particular system. But it negatived the narrower meaning by using the word "general."

Faced with that argument, the opinion of the three

judge court, 30 F. (2d) 427, entirely changed the grammatical structure of the clause to answer the argument. It said:

> "It is contended that the presence of the word 'general' in the phrase 'general steam (railroad) system of transportation,' requires that the broader of the two meanings we have discussed should be applied. But the word 'general' may be given proper weight if it is referred to the kind of transportation, excluding railroads engaged in a special or local service, and indicating those engaged in general transportation."

In other words, that court, to reach the conclusion it reached, totally changed the grammatical sense of the clause and treated it as if it had been written "not operated as a part or parts of a steam railroad system of general transportation."

Nothing can be clearer than that, in the clause as written, "not operated as a part or parts of a general steam railroad system of transportation," the word "general" modifies the word "system," not the word "transportation." The clause must be entirely re-written and the grammatical meaning wholly changed, to make "general" modify "transportation."

Such disregard of the grammatical meaning as written, such torturing of the context and grammar to arrive at a different meaning from that shown by the language used, violates, we submit, the rule of construction of *Spokane and Inland R. R. Co. v. U. S.*, 241 U. S. 344, 350, to which the court gave effect in construing the word "interurban". If the remedial language of a remedial act must be given a liberal or broad interpretation in order to effectuate the remedial purposes, and if for the same reason an exception to the remedial provision must be given a narrow or strict construction, it equally follows for the same reason that an exception to

the exception, a limitation upon the exception, must be given a broad and liberal construction. A narrow or strict construction of the exception to the exception would have the same effect as giving a broad construction to the main exception, or a narrow construction to the remedial provisions. A construction which narrows the remedial provisions conflicts with the legislative purposes and is forbidden. A construction which broadens the exception to the remedial provisions is forbidden because that produces the same result as narrowing the remedial provisions. The exception to the remedial provisions may be broadened in violation of this rule equally either by a direct broad construction of the exception itself or by a narrow construction of an exception to or limitation upon the main exception. Both have the same effect as a narrow or strict construction of the remedial provisions.

The clause "not operated as a part or parts of a general steam railroad system of transportation" is an exception to or a limitation upon the main exception which excludes "street, suburban and interurban electric railways" from the remedial provisions of the act. Restricting the meaning of "general steam railroad system of transportation" has exactly the same effect to enlarge the class of the main exception of "street, suburban and interurban electric railways," as would a broad construction of the language excepting that class. And both would equally narrow and restrict the class to be included within the remedial provisions of paragraphs (18) to (20).

We submit that the broader of the two constructions must be given to "general steam railroad system of transportation" under the very same rule which calls for a strict construction to be put upon the excluded class of "street, suburban and interurban electric railways." The fundamental and controlling rule throughout is to give such construction to all provisions, the

remedial provisions, the main exception therefrom, and the exception to or limitation upon the exception, as will liberally effectuate the remedial purposes.

Under this principle it is quite inadmissible to change the grammatical sense of "general steam railroad system of transportation" so as to make "general" modify "transportation" and to destroy its plain meaning as modifying "system," and thereby to make "system" mean a particular steam railroad system, rather than a general one. Congress expressly and plainly wrote the words so as to show conclusively that it meant a "general steam railroad system" rather than a particular one.

Although Judge Soper's opinion did not so state, it is evident that the three judge court gave more significance to the use of the indefinite article before the word "general" than it did to the word "general" modifying "system." The thought was that the use of the indefinite article would indicate the narrow meaning of a particular railroad system, whereas the use of the word "general" categorically indicates a broader meaning, something more "general" than a particular railroad system. Too much significance is given to the use of the indefinite article if it is made to destroy the meaning and effect of "general".

If Congress had written the clause, "which is not operated as a part or parts of *the* general steam railroad system of transportation," it would have been clear beyond dispute that the meaning was the national transportation system, in which sense this Court used the word "system" in *Railroad Commission of Wisconsin v. Chi., B. & Q. R. Co.*, 257 U. S. 563, 585; *New England Divisions Case*, 261 U. S. 184; *Dayton-Goose Creek Case*, 263 U. S. 456, and the *Texas & Pacific Case*, 270 U. S. 266. And it would have been clear beyond dispute that petitioner would be within the clause. Petitioner's railroad is certainly operated as a part or parts of the

national steam railroad system of transportation, which the Act sought to preserve, just as much as the Durham and Southern or any other interstate steam railroad. It is an integral and important part of the national system.

But the use of the indefinite article does not necessarily lead to the alternative that a particular steam railroad system was meant, a particular corporate ownership, control or operation. The national steam railroad system of transportation, that "backbone" of the nation's transportation facilties so often referred to, and which was the main subject to which the whole Transportation Act was addressed, is not only "the general steam railroad system of transportation" but is by the same token "*a* general steam railroad system of transportation."

To give to the indefinite article the controlling force of demanding construction of the limiting clause of the proviso as meaning *a particular steam railroad system*, is to take away from it its essential quality of indefiniteness and give it the quality of definiteness and particularity which is the essence of the definite article. "A" generalizes; "the" particularizes. Certainly "a general" generalizes and does not particularize.

Courts have habitually construed the indefinite article as connoting generality rather than particularity.

In *Thompson v. Stewart,* 60 Iowa 225, 14 N. W. 247, it was held that where a person contracted to lease for a certain purpose "a room that is improved and suitable," he does not bind himself to furnish a particular room or one room, but fulfills his contract if he provides additional room, improved and suitable.

In *Commonwealth v. Wetzel,* 84 Ky. 537, 2 S. W. 123, it was held that the term "a judge" in a statute providing that "a judge" may cause any house to be searched for gaming tables, comprehends a general or entire class, and cannot, without distorting its meaning, be

restricted to judges of county, city, and police courts; and therefore that the judge of the Louisville law and equity court has authority to issue such a search warrant.

In *City of St. Louis v. Handlan,* 242 Mo. 88, 145 S. W. 421, it was held that the St. Louis charter authorizing the assembly to establish "a building line" along boulevards, did not prevent establishing different building lines along the same boulevard.

In *United States v. Perry,* 133 Fed. 841, it was held that a provision in a tariff act referring to statuary produced from "a solid block or mass of marble," was not limited to statuary made from a single block, but included statues each carved from three solid blocks of marble.

In *Bourland v. First Nat. Bank Bldg. Co.,* 152 Ark 139, 237 S. W. 681, it was held that a statute providing for the designation of a depository for city funds and requiring all funds to be deposited therein when "a" city depository is selected, did not limit the city to a single bank as depository, the article "a" being a word of vague meaning and too indefinite to limit to a particular depository.

Again, the expression "which is not operated as a part or parts of a general steam railroad system" does not impose as the sole alternative meanings either a particular steam railroad system or the entire national system. There is a more general meaning of "system" than that of a particular system with unity of corporate control, and which yet is less general than that of the entire steam railroad system of the nation.

Section 15a, in providing for treatment by rate groups, recognized that the entire system of transportation of the nation was made up of regional or rate-group systems, and provided for uniform treatment within each regional system. In *New England Divisions Case,* 261 U. S. 184, the New England carriers had received group

treatment on divisions. They appeared together in the case as a regional system of transportation. Relief given by the Commission to the carriers as a regional system was sustained.

Manifestly there the New England carriers constituted "a general steam railroad system," and yet less general than the whole steam railroad system of transportation of the country.

So the steam railroad system of the Southeast is a "general steam railroad system of transportation," made up of particular systems under particular control. The facts show that the petitioner is an integral and important part of such general system, is operated as a part thereof. It is, accordingly, not within the exclusion of paragraph (22), even if "a general steam railroad system of transportation" be construed to have a narrower meaning than the entire general system of the United States.

Certainly the expression, "a general steam railroad system of transportation," in a limitation upon an exception to a remedial statute written in for the very purpose of more sharply narrowing the exception and taking less cases out of the remedial provisions, cannot fairly be construed as meaning a particular steam railroad system, without entirely deleting the word "general."

The legislative history, the manner in which it was throughout universally agreed that the purpose of paragraph (22) was to take out of the regulation of paragraph (18) only constructions and abandonment of a purely local character and importance, not calculated to conflict with the remedial purposes of the Act, and within the regulatory competency of local authorities, and finally the writing in of the express limitation "which is not operated as a part (or parts) of a general steam railroad system of transportation" to restrict the exceptions, in section 20a, in 15a and in section 1, paragraph (22), shows that Congress was

excluding only "parochial matters," not having a general bearing on the general transportation system. The *rationale* of the exclusion is the same as that suggested by this Court in *Lehigh Valley R. Co. v. Board of Public Utility Comrs.*, 278 U. S. 24, as the dividing line between federal authority under the Transportation Act and authority left in the States.

The spirit, purpose and policy of the Transportation Act throughout was to bring under federal regulation and under the administrative authority of the federal Commission those matters having a general importance and bearing on the general transportation system, and to leave the "parochial" matters to local authorities because not calculated to conflict with the purposes of the Act.

Just as "spur, industrial, team, switching and side tracks, located or to be located wholly within one state," when those words are properly construed in the light of the context and of the legislative purposes, refer to "parochial" matters, so "street, suburban, or interurban electric railways," when those words are properly construed in the light of the same principles, also refer to matters of only parochial and local importance.

But as to the latter Congress made the assurance doubly sure that nothing but parochial matters should be excluded from regulation by adding the express limitation "which are not operated as a part or parts of a general steam railroad system of transportation."

There is nothing "parochial" about the extensions enjoined in this case. They have a vastly greater general bearing on national transportation than had the proposed trackage of the Santa Fe which this Court held was properly enjoined. And unless the court below be affirmed, the result is that the mere incident of electric motive power confers complete freedom on an interstate carrier of national importance to accomplish all of the injuries and evils of unrestricted expansion sought to be remedied by paragraph (18).

In last analysis, Congress, when it wrote the somewhat involved, the ambiguous, the inartificial, language of paragraph (22), was not engaging in an exercise in grammar or etymology. It was dealing with a very practical problem of remedial legislation and division of powers. It was seeking to express an intention. What that intention was can only be arrived at by the application of the doctrine of the *Texas & Pacific Case,* which is entirely controlling here. Congress plainly did not intend to confer immunity on all electric railroads other than electrified portions of steam railroads. It plainly did not intend to confer immunity on a railroad such as petitioner to make unauthorized extensions of the character here involved.

In *The Lion* (1869), L. R. 2 P. C. 525, at p. 530, 38 L. R. Ad. 51, at p. 54, Lord Romilly, M. R., delivering the judgment of the Judicial Committee, said:

> "The meaning of particular words in an Act of Parliament, to use the words of Abbott, C. J., in *Rex v. Hall,* 'is to be found not so much in a strict etymological propriety of language, nor even in a popular sense, as in the subject or occasion on which they are used.'"

That statement is an epitome of this Court's holding in the *Texas & Pacific Case* and of the holding of the District Court below in the present case.

## CONCLUSION.

It is respectfully submitted that the decree below was right and should be affirmed.

S. R. PRINCE,
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*Southern Railway Company.*

F. B. GRIER,
CARL H. DAVIS,
*Solicitors for Respondents,*
*Charleston & Western Carolina Railway Company, and Atlantic Coast Line Railroad Company.*

WILLIAM C. BURGER,
SIDNEY S. ALDERMAN,
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*Louisville & Nashville Railroad Company.*

JAMES J. MCLAUGHLIN,
SIDNEY S. ALDERMAN,
*Solicitors for Respondents,*
*Carolina, Clinchfield & Ohio Railway,*
*Carolina, Clinchfield & Ohio Railway of South Carolina, and*
*Clinchfield Northern Railway of Kentucky.*

# SUPREME COURT OF THE UNITED STATES.

No. 664.—October Term, 1931.

| | |
|---|---|
| Piedmont and Northern Railway Company, Petitioner, *vs.* Interstate Commerce Commission et al. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit. |

[May 16, 1932.]

Mr. Justice Roberts delivered the opinion of the Court.

In 1910 a charter was granted under the laws of North Carolina for Piedmont Traction Company, as a street railway corporation, authorized to construct street railways in and near Gastonia, with the limited powers of such a company. In the same year the Greenville, Spartanburg and Anderson Railway Company was chartered under the laws of South Carolina, as a street railway corporation, with power to run between fixed terminii, Anderson on the south and Spartanburg on the north. A syndicate was then formed which procured a charter for petitioner as a railroad corporation under the law of South Carolina, with full power of eminent domain and authority to operate by electricity or otherwise. The Piedmont Traction Company built certain lines in North Carolina, put them into operation, acquired the street railway system of Charlotte and trackage rights over the street railway system of Gastonia. The Greenville, Spartanburg and Anderson Railway Company acquired a line from Belton to Anderson; built one from Greenwood to Greenville, and afterwards on to Spartanburg; secured trackage rights over the street railway systems in Greenville and Anderson and put all of them into operation in April, 1914. The Traction Company and the Railway Company then conveyed their respective properties to the petitioner.

Until the close of 1926 the petitioner owned and operated two separate and disconnected lines of railway, one in South Carolina extending from Greenwood to Spartanburg, about eighty-nine miles, with a branch from Belton to Anderson of eleven miles, and the other in North Carolina extending from Gastonia to Charlotte, about twenty-three miles, with a branch to Belmont, three miles.

In March, 1927, pursuant to corporate action, it proceeded to construct two extensions, one from Spartanburg, the then northern terminus of the South Carolina line, to Gastonia, the southern terminus of the North Carolina line, a distance of fifty-three miles; the other an extension from Charlotte northward to a new terminus at Winston-Salem, North Carolina, a distance of seventy-five miles. The Interstate Commerce Commission notified the company that appropriate application should be made for a certificate of public convenience and necessity authorizing these extensions and that this might be filed without prejudice to the petitioner's making a claim of exemption as an interurban electric railway under § 1, Par. 22, of the Interstate Commerce Act. This course was followed. The Commission overruled the claim of exemption and denied a certificate on the merits. The company brought suit in the United States District Court under the Urgent Deficiencies Act[1] to set aside and annul that portion of the Commission's order which denied it exemption as an interurban electric railway. A statutory court was convened, and after hearing dismissed the suit on the merits.[2] Upon appeal this court held that the order of the Commission, being negative in substance as well as in form, infringed no right of the petitioner, was beyond the scope of the remedy afforded by the Urgent Deficiencies Act, and therefore the suit should have been dismissed for want of jurisdiction.[3]

Thereafter the board of directors by resolution reaffirmed the intention to build both extensions and authorized the construction of the connecting link between Spartanburg and Gastonia. The Commission, upon being advised that work had actually started, brought the present suit in the District Court for Western South Carolina, alleging that the construction was illegal, since no certificate had been obtained as required by the Transportation Act of 1920, § 402, paragraph (18).[4] It sought an injunction pursuant to the terms of paragraph (20) of the section. Several interstate railroads were permitted to intervene as parties in interest. (See *Western Pacific California R. R. Co.* v. *Southern Pacific Co.*, 284 U. S. 47.) The petitioner defended upon the grounds that the work had been undertaken within ninety days

[1] U. S. C., Tit. 28, § 47.
[2] 30 F. (2d) 421.
[3] *Piedmont & Northern Ry. Co., et al.*, v. *United States*, 280 U. S. 469.
[4] Ch. 91, 41 Stat. 476.

of the adoption of the Transportation Act and for that reason no certificate for the proposed extensions was required,[5] and that petitioner was within the exception to the Commission's jurisdiction over extensions and new construction, created by paragraph (22) of § 1 of the Act, as an interurban electric railway not operated as a part of a general steam railroad system of transportation. After a hearing on pleadings and proofs the trial court overruled both defenses and entered a decree enjoining the further work of construction until a certificate of convenience and necessity should be obtained. Petitioner appealed to the Circuit Court of Appeals for the Fourth Circuit, and we granted certiorari prior to hearing by that court.[6]

The petitioner has abandoned its first contention and stands only on the claimed exemption.

Section 1 of the Interstate Commerce Act, as amended by § 402 of the Transportation Act[7] provides:

"The authority of the commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

Paragraphs (18) to (21) authorize the Commission to grant a certificate for extensions of line or constructions of new line, or for the abandonment of lines, forbid such action without such certificate, and give the Commission or any party in interest the right to enjoin action in disregard of their provisions.

In support of the claimed exemption petitioner says its lines are exclusively electric, are not operated as parts of a general steam railroad system of transportation, were constructed, equipped, and are maintained and conducted as interurban electric railways, and that the proposed extensions would be of the same character and operated in the same manner. The concession is made that the company is engaged in the general transportation of freight and passengers in interstate commerce, that the

[5]See § 402 (18) of the Transportation Act, 1920, 41 Stat. 477. "After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, &c." The first eight words are omitted in U. S. C., Tit. 49, § 1 (18).

[6]U. S. C., Tit. 28, § 347.

[7]U. S. C., Tit. 49, § 1 (22).

proposed extensions would be so operated in connection with the existing lines, and that petitioner is therefore subject to the Interstate Commerce Act as amended by the Transportation Act, 1920, except those portions from the application of which interurban electric railways not operated as a part or parts of a general steam railroad system of transportation are expressly excluded. In summary the argument is that paragraph (22) in unambiguous terms excepts petitioner's road from the effect of paragraphs (18) to (21) of § 1, needing neither construction nor interpretation in its application; but that if there be question regarding this contention, the facts with respect to the railway bring it within the intent of the excepting clause, and, finally, that various governmental agencies have so classified it.

Emphasis is placed upon the aptness of the words used in the paragraph as descriptive of petitioner's railway. Thus it is said the road is "electric"; is "interurban", since it extends between cities; and is "not a part of any system of steam railroads". But this literal application is inconclusive, for it ignores the entire phraseology employed, which is, "street, suburban, or interurban electric railways" . . . . The descriptive adjectives show that Congress had in mind a class of carriers differing essentially from those long recognized as the objects of national concern and regulation. A few illustrations will demonstate the impossibility of the proposed narrow construction. It would hardly be contended that if an interstate steam railroad should electrify its entire system this would place it beyond the reach of paragraphs (18) to (21). Yet the road would become both electric and interurban in the etymological sense of the words, and would not be operated as a part of a general system of steam railroad transportation. Should a new electric transcontinental system be projected without question application for a certificate under those paragraphs would be required, though here again by mere verbal interpretation it would be exempt from the necessity.

We must therefore seek further to ascertain the distinguishing features which the legislature had in mind. No difficulty is encountered in defining a street or a suburban electric railway. These are essentially local, are fundamentally passenger carriers, are to an inconsiderable extent engaged in interstate carriage, and transact freight business only incidentally and in a small volume. The record indicates that prior to 1920 such street or suburban railways had grown in many instances so as to link distinct communities, and that in addition so-called interurban lines were con-

structed from time to time, to serve the convenience of two or more cities. But the characteristics of street or suburban railways persisted in these interurban lines. They also were chiefly devoted to passenger traffic and operated single or series self-propelled cars. Many of them carried package freight, some also transported mail, and still fewer carload freight picked up along the line or received for local delivery from connecting steam railroads. It is clear that the phrase "interurban electric railway" was not, in 1920, commonly used to designate a carrier whose major activity was the transportation of interstate freight in trains of standard freight cars. It cannot be said, therefore, that if a railway is operated by electricity and extends between cities paragraph (22) clearly and unequivocally exempts it from the Commission's jurisdiction.

Petitioner, however, insists that examination of the facts with respect to its road demonstrates that it falls into the exempt class. The salient features to which reference is made are that the lines connect and tie in with the street railway systems in the cities and towns on the system; that of the main line trackage fifteen miles are operated jointly with street car lines; that the street railways in the cities were acquired so that the interurban tracks might be connected with them for urban terminal and trackage facilities; that the motive power is exclusively electric; that the road is not a part of any steam railway system; that a lower voltage, a lighter overhead construction and power supply, and a smaller substation capacity are employed than those of standard steam railroad electric lines; that the signal system would not be suitable for use on a main line steam railroad; that the locomotives are lighter than the standard engines used by steam railroads which have electrified their systems; and that the passenger cars are motivated by self-contained motor units instead of being drawn by locomotives.

These alleged distinctions lose much of their significance when we consider other facts found by the trial court, without exception or assignment of error. These may be summarized. Only 2.9 miles of the present total trackage, or about 2.25 per cent, is located in city streets. The balance is built and operated on private right-of-way and goes around rather than through the cities. The tracks are standard gauge and of standard railroad construction, were, at the time they were laid, of higher class than those of the Southern Railway Company in the same territory, were intended for handling substantial interchange freight traffic in connection with steam railroads, have the same ruling grades as the latter in the same territory, and are of eighty pound rail. There are 17 elec-

tric locomotives, ranging from 55 to 100 tons weight; 287 freight cars are owned, which have no electric equipment, are the same in all respects as steam railroad freight cars, are interchangeable with steam railroads, and are and have been regularly so exchanged. Foreign line freight equipment of every character flows freely over the road. As of December 31, 1929, the total investment in equipment since June, 1914, was $778,194, approximately 85 per cent of which represented expenditures for locomotives and interchangeable freight cars used exclusively in the carriage of freight. The electric locomotives are used only for freight. The freight yards are of standard steam railroad construction and equipment, and one of them is a joint facility with the Seaboard and Georgia & Florida, steam railroads. While the locomotives are lighter than those employed on standard steam railroads, they are adequate for the petitioner's traffic. By doubling, as many as 65 freight cars may be drawn, and trains of 40 and 50 cars are usual. Through and local freight trains are operated in the same manner as on steam railroads.

Methods of business solicitation, membership in traffic organizations, and tariffs published and concurred in, are national in scope. The road has filed seventeen general individual tariffs under I. C. C. serial numbers, is a party as initial carrier to 184 general tariffs, and as participating carrier in 364 tariffs published under powers of attorney given to the steam railroads. These tariffs embrace the entire country and parts of Mexico and Canada. From the beginning freight revenues have been large, while those from passenger traffic have progressively decreased. The freight revenues have increased from $496,772.39 for the year ending June 30, 1914, to $2,317,528.77 for 1929. The total passenger revenues for the year ending June 30, 1914, were $324,045.21, but were only $71,562.72 for 1929. For the latter year the freight revenues were 94.5 per cent and the passenger revenues 2.9 per cent of the total revenue. For 1929, 4.3 per cent of the total freight revenues were from local freight, and 95.7 per cent from interline interchange freight. A comparison of interstate with intrastate freight shows that in 1929, 80.7 per cent was interstate and 19.3 per cent intrastate, the latter including freight interchanged with steam railroad connections but originating and destined to points within the same state. There is more than one loaded car of freight each day on petitioner's line for every passenger carried. The average interchange of carload freight with steam railroads of the territory is approximately 6,000 cars per month.

The petitioner now has a connection at its southern terminus with the Georgia & Florida, a steam railroad. See *Atlantic Coast Line R. R. Co.* v. *United States*, 284 U. S. 288, 291. If the proposed extensions were built it would have a similar connection at its northern terminus with the Norfolk & Western. Thus it would become a connecting link in a new through route and effective line of connecting carriers which would be strongly competitive with existing trunk lines, leading from Florida and the southeast to the northern gateways reached by the Norfolk & Western. If only the proposed extension to close the gap between Spartanburg, S. C. and Gastonia, N. C., should be built the same result would follow, except that the route from Charlotte to Winston-Salem and the connection there with Norfolk & Western would not be entirely over petitioner's own lines, but over a joint route on the Norfolk Southern to Norwood, and Winston-Salem Southbound to Winston-Salem. Petitioner's own estimate contained in its application to the Commission is that the extensions would gain new business diverted from steam railroads of 82,320 cars a year, including 12,300 cars of bridge traffic carried entirely over its lines as the interior connecting link in joint through routes, resulting in a gain of revenue of $3,890,000 for the first year. The estimated loss of revenue to competing carriers is considerably greater. It thus appears that petitioner's business is preeminently interchange interstate freight traffic of national character, in all essential respects conducted as is the business of the steam freight carriers in the territory served. The differences in construction, equipment, operation and handling are incidental merely to the use of electric motive power in lieu of steam. The purely local traffic in freight, passengers, baggage and express, is relatively inconsequential.

In *Texas & P. R. Co.* v. *Gulf, C. & S. Ry. Co.*, 270 U. S. 266, 277-278, the court announced the guiding principles to be followed in construing the very paragraph involved in the case at bar. As there indicated, the purpose of the statute to develop and maintain an adequate railway system for the people of the United States requires a broader and more liberal interpretation than that to be drawn from mere dictionary definitions of the words employed by Congress. Accordingly, a track seven miles in length, proposed to be constructed to reach industries in territory not theretofore served by the railroad, and which would take away from a competitor much of the traffic then enjoyed, was held not to be an

"industrial track", as that phrase is used in paragraph (22), although by strict construction it was such.

The petitioner's railway is of such importance in interstate commerce and renders a service so predominantly devoted to the handling of interstate freight in connection with steam railroads, is in such relation to connecting steam carriers, and competes with steam trunk lines in such manner, that in view of the declared policy of the act we cannot hold it an "interurban" railway within the exemption of the same paragraph. The Transportation Act was remedial legislation and should therefore be given a liberal interpretation; but for the same reason exemptions from its sweep should be narrowed and limited to effect the remedy intended. *Spokane & Inland Empire R. Co.* v. *United States*, 241 U. S. 344. In cases where an appreciation of the facts is requisite to proper classification it is not always easy to draw the line. Instances may be supposed where great difficulty might be experienced in determining whether an electric railway line falls within or without the exception of paragraph (22). But this is not such a case. The facts clearly require a holding that petitioner's railway is not within the true intent and purpose of the exclusion intended by the paragraph.

Only a word need be said with respect to the contention that governmental agencies have heretofore classified the railway as an interurban electric line. It is true that in connection with quite diverse administrative functions the United States Labor Board, the Postmaster General, and the Interstate Commerce Commission have classified petitioner's railway as an interurban electric line in distinction to steam railroads. Neither the administrative nor the statutory classification has, however, been uniform, and in any event is not controlling in this litigation.

Attention is drawn to the fact that the same phraseology is used in other sections of the Interstate Commerce Act. But it is so used with other purposes in view.

We are of opinion that the District Court correctly held that petitioner falls within the terms of paragraphs (18) to (21) of § 1 of the Interstate Commerce Act, and was properly enjoined from proceeding with the construction of the proposed extensions in the absence of a certificate of convenience and necessity. The judgment of the District Court is

*Affirmed.*

The CHIEF JUSTICE took no part in the consideration or decision of this case.